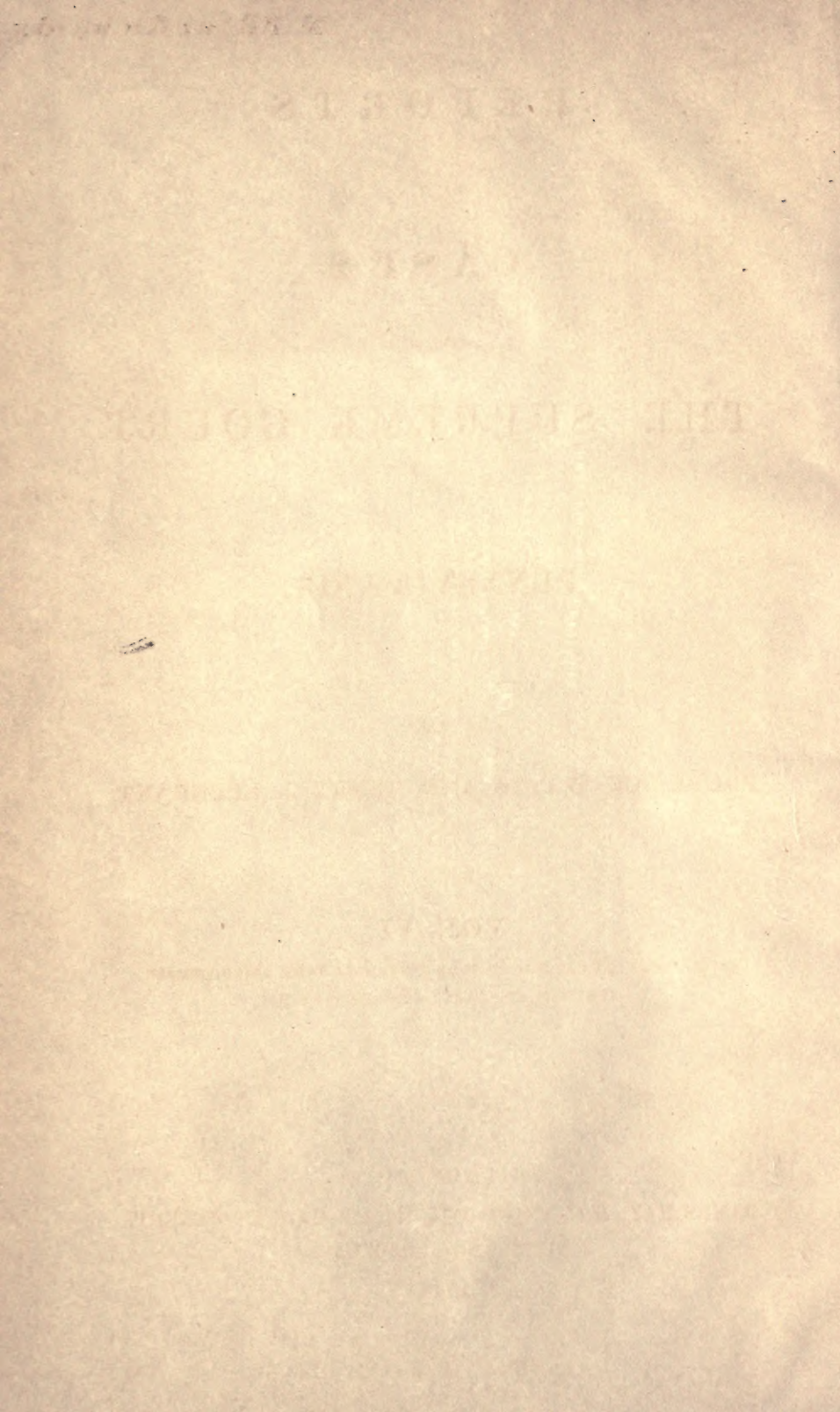




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111

REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

FREDERICK WATTS AND HENRY J. SERGEANT.

VOL. VI.

CONTAINING THE CASES DECIDED IN SEPTEMBER TERM AND DECEMBER
TERM 1843, AND PART OF MARCH TERM 1844.

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JUDGES
OF THE
SUPREME COURT OF PENNSYLVANIA,
DURING THE PERIOD OF THESE REPORTS.

JOHN BANNISTER GIBSON, Esq., Chief Justice.

CHARLES HUSTON, Esq.,	} Justices.
JOHN KENNEDY, Esq.,	
THOMAS SERGEANT, Esq.,	
MOLTON C. ROGERS, Esq.,	

OVID F. JOHNSON, Esq., Attorney-General.

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

WESTERN DISTRICT, SEPTEMBER TERM, 1843.

Logan against Mason.

The provision of the Roman law, which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted as a part of the common law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it generally as collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned.

ERROR to the District Court of *Allegheny* county.

John T. Logan and Robert T. Kennedy, trading under the firm of Logan & Kennedy, against Washington Mason and William Dilworth, trading under the firm of Mason & Dilworth. It appeared by a case stated that the defendants, Mason & Dilworth, were indebted, at the dissolution of their partnership, on the 27th June 1839, to the plaintiffs, Logan & Kennedy, who held their bills and notes for about \$2000. Mason, who continued the business, and Owens, his surety, contracted with Dilworth, who retired, to pay the partnership debts. Mason continued to deal with the plaintiffs, on his own account, till the 4th December 1839, when he was indebted to them, including a small bill he owed

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them at the dissolution of the partnership, in the sum of \$259.79. On the 25th November 1839 he transferred to them a note drawn in his favour by Johnson, which was no part of the joint effects, for \$550, as collateral security, without specifying for what debt. He made a general assignment on the 19th January 1840, preferring Owens as his surety, and was discharged as an insolvent debtor on the 23d March 1840. On the 13th May 1840, Logan & Kennedy applied the proceeds of the note, by an entry on their books, to the debt due from Mason on separate account in the first place; and the residue to the debt due by Mason & Dilworth. Owens subsequently paid the plaintiffs all the partnership debt except the part of it which he insisted ought to have been satisfied out of the proceeds of the note; and it was agreed, if the court should be of opinion that the plaintiffs had a right to apply the proceeds of the note to Mason's separate debt, in the first instance, judgment should be rendered in their favour for the \$259.79; otherwise for the defendants. The District Court gave judgment for the defendants, and the record was removed to this court by writ of error.

M'Candless, for the plaintiffs, cited 1 *Wash. (Virg.) Rep.* 133; 4 *Cra.* 320; 9 *Wheat.* 724; 29 *Engl. C. L. R.* 25; 30 *Ibid.* 286; 35 *Ibid.* 78; 2 *Hall* 197; 4 *Gill. & J.* 372.

Eyster, for the defendants, relied on *Harker v. Conrad*, (12 *Serg. & Rawle* 301); *Gass v. Stinson*, (3 *Sumner's Rep.* 110); and the *American Lawyer's Magazine*, No. 1, art. 2.

The opinion of the Court was delivered by

GIBSON, C. J. — If anything has been settled by decision, it is that the right to apply a payment without restriction as to anything but the time, devolves on the creditor in default of application by the debtor; and I feel myself so bound by it, that were I ever so well convinced of the superior excellence of the civil law, I could not adopt it. I know not how an English or an American judge can strip an adopted rule of its common law emendations merely because they were originally no part of it. It has become the law of his court, not by virtue of any inherent obligation in it, but by the force of precedent; and the same force that was competent to adopt it, was equally competent to establish the parts that were added to it. If the courts were to discard them now, the law of contracts, of testaments, of donations *causâ mortis*, of guardian and ward, and, in short, of the whole mass of moveable property, would be thrown into hopeless confusion by it, followed by instability of decision—the worst curse that can befall a people. Notwithstanding the admitted excellence of the Latin code, the English Judges were constrained to alter almost every part of it which they introduced into the body of the common law, in order

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to fit it to modern use; and the continental states who profess to have received it entire, followed, only to a less extent, the footsteps of their more commercial neighbours. These alterations were indispensable to make the jurisprudence of the day keep pace with the changes wrought in the affairs of men by the lapse of a thousand years. Yet, encouraged by an article in the *Lawyer's Magazine*, (No. 1, art. 2), and by the authority of Mr. Justice STORY, in *Gass v. Stinson*, (3 Sumner's R. 110), the District Court have disregarded an actual application by the creditor in due season, though there had been no application by the debtor. For everything that comes from Mr. Justice STORY, I feel a deferential respect; and had not the weight of his name been thrown into the scale, I should not have felt myself called on to vindicate the rule of the common law. But in saying that as regards the application of payments, the Roman law is more rational and consonant to the presumed intention of the parties, than the common law; that it is equally simple and convenient; and that it is, or ought to be, the law of the subject in this country; it seems to me, his partiality for his favourite code has carried him too far. In the American courts, the question is not an open one; and it would require some intolerable mischief—certainly more than an equality in point of simplicity, convenience and reasonableness—to justify us in overturning the decisions of more than two centuries. Were we called on to engraft a new principle on the common law stock, without lopping a branch to make room for it, I would certainly do as Lord MANSFIELD did, in laying the foundations of the English commercial law—I would take it from what he, perhaps justly, called the first collection of written reason that ever existed. Its fault, if it has one, is in aiming to do too much, by attempting to give effect to abstract equities which are too subtle to be dealt with by a human tribunal; at least by one encumbered with a jury. There is, however, no such equity in the case before us.

It is agreed that the application of a payment belongs to the debtor in the first instance; and that, in default of application by him, it devolves on the creditor. So far the Roman law and the common law march together. But the Roman law has this extraordinary proviso, that the creditor make the application as he would make it if he were the debtor; and any other application by him would go for nothing, on the ground that his act is consonant to the presumptive wish of the parties only, when it is most beneficial to him who paid. It is scarce necessary to say how unfounded is such a presumption, in experience, which is the mother of presumptions. It certainly is a narrow basis for a moral duty. Why should the creditor, standing in no relation of confidence, be expected to take care of the interest of a party who is too supine or indifferent to take care of it himself? Conscience has nothing to do with such a case; for the man who will not exercise his right at the proper time, renounces it. This princi-

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ple is the foundation of many of our titles. When the land of an intestate has been divided by partition in the Orphan's Court, the children have priority of choice between the purparties in the order of their seigniority and sex; but when the oldest son neglects to choose, his priority passes to the next in order, who is not bound to consult any particular interest in the use of it. No lawyer ever dreamt that an elder son, who had slipped his time, might recover from his younger brother on the ground that his interest had not been sufficiently cared for. Such a pretension would be met with ridicule. It may be said that this is a judicial proceeding. But if the owner of an earlier descriptive land-warrant, who has a right to have it satisfied out of the best part of the vacant land, omit to exercise it by having his survey made in due time, he will pass his priority to the owner of the later warrant, who may then choose for himself without jeopardizing his title. And this is a proceeding *in pais*. It will not do to say that this is a principle of local and peculiar law. I know not a more beautiful system, nor one more founded on principles of general equity, than the land-laws of Pennsylvania. Why should there be a difference, in this respect, between the appropriation of land to a particular warrant, and the appropriation of money to a particular debt? A right of choice is essentially exclusive; and if the creditor's right of application is to be controlled by the interest of the debtor, it is no right at all. The exercise of the power devolves on the creditor either as a right or as a duty. If as a right, it is absurd to say he may exercise it, but only in subordination to the right of another. Yet the Roman law says so, and tacitly admits that its proviso is repugnant to its rule. The writer who champions it in the magazine, goes further, and admits that the proviso seems to be expressed in mockery of the creditor. If, however, the power devolved on the creditor subject to a duty to make the application in a particular way, he might be compelled to exercise it. But why compel him to go through the form of an application which the law would make without his assistance? That would be a mockery indeed. The well-founded remark of the chancellor of New York, in *Stone v. Seymour*, (15 *Wend.* 29), shows clearly the want of a moral obligation, in this matter, which the Roman law would enforce as a moral duty. As a rule of morals, the golden precept, to do as we would be done by, ought to bind the debtor as it binds the creditor; yet it is not assumed by that law that the debtor, when he makes the application, is bound to consult the interest of the creditor; though it is a maxim of our law that equality is equity. But, says the writer in the magazine, this is a mixing up of things quite distinct from each other; for the maxim, thus commented on, of a code drawn from a remote period of paganism, does not aspire to the golden rule inculcated by our Saviour. To what, then, does it really aspire, that we should be bound to displace the decisions of two hundred years to

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make way for it? The morality of the New Testament is for all times; and that the maxim cannot endure a test so severe, is proof as strong as holy writ, that there is something wrong in it. And if it be not founded in moral duty, whence comes its obligation? The writer himself claims no such foundation for it, but places it on the pedestal of a sentiment for the poor debtor. The sentiment, however, would be ill bestowed on the debtors of our day; for the poor man is not so often in debt as the rich one, by reason that he cannot so readily get credit. The capitalists are the luxurious consumers, the great purchasers, the great traders, the great manufacturers, the great borrowers, and consequently the great debtors. Nor does sympathy for the poor give tone, as the writer supposes, to either our legislation or our jurisprudence. In no country is the power of wealth more oppressively exerted than in our own. Witness our unequal taxation, which favours the land-holders and casts the public burthens on the feeble and defenceless, who have no refuge from power, but complaint; and witness stay-laws and relief-laws passed avowedly for the protection of property. Witness, too, the impunity granted to banking companies. The really poor debtor has no need of these. He has no land, no complicated dealings to involve him in debts on distinct accounts; makes no payments, and is indifferent to priorities of application. His refuge is the Insolvent Law, which makes his creditor his slave. As respects jurisprudence, I am proud to say, the bench has not disgraced itself by forgetting the scriptural precept: "Ye shall do no unrighteousness in judgment; thou shalt not respect the person of the poor, nor honour the person of the mighty." (Leviticus, ch. xix., v. 15.) The proviso of the Roman law, then, has not even this same antiscriptural sentiment to give colour to it; and the only thing else which the writer seems to claim for it, is that it is not altogether impracticable. The seductive facility of application, which he charges against the rule of the common law as a defect, might perhaps be placed to the other side of the account. But the true cause that there is priority of application at all, is not the supposed merit or misfortune of the party, but necessity. It must be vested somewhere; and the common law vests it in the debtor, because, in the transaction of payment, he takes the first step. If election is given of several things, says Lord COKE, (1 *Inst.* 144), he shall have it who is the first agent, and ought to do the first act. If, as I conjecture, the rule of the Roman law has the same origin, its supposed sentiment is no better founded than its morality.

The rule of the common law seems better founded in both reason and convenience. Its facility of application is a great, and an original praise. Who can tell how a debtor would have his payment applied? Not the debtor himself, if his interest were so balanced as to make him indifferent to the event; and if it were not, he would take care to give the proper direction at the proper

[Logan v. Mason.]

time. How could the creditor decide for him, if he could not, or would not, decide for himself? He might call on the debtor for instructions; but then the application might happen not to be the act of the creditor, except as the debtor's puppet; and the creditor's privilege would thus be deceptive. Though he should have acted in good faith, yet if the Judge should think he had erred in his belief that the particular application was the best thing that could be done for the debtor, it would go for nothing. It is plain, therefore, that the right of application held out to the creditor by the Roman law, is illusive. It is a solecism to call it a right, if it is not an independent one. And when the Judge would come to correct the creditor's error, he would be bewildered with the same distracting considerations that misled the creditor in the first instance, and that would have led to the conflict of decision in the English and American courts, complained of by the writer, where there was no actual application by either party. But nothing is more easy than to determine whether there was an application in fact when the money was received. There has doubtless been inconsistency of decision in regard to the period allowed for the creditor's election; but the inconvenience from it will not be a durable one. The reasonableness of notice to the drawer of a bill or the endorser of a note, was for a time determinable by no definite rule; yet it is now susceptible of legal certainty; and it would be just as easy to find a rule for the time of application. The case before us stands clear of difficulty on that head, and I pretend not to lay down such a rule authoritatively; but I take it that the entry or memorandum of the application ought to be of a date so early as to raise a presumption that the act of application was simultaneous with the act of reception, and not the consequence of an after-thought. It seems to be the better opinion that an application by either debtor or creditor must be part of the *res gesta*, the difficulty being to fix the point of time beyond which the entry or memorandum of it shall not be delayed. It would seem reasonable to put it on the footing of a charge in a book of original entries, which must appear in its place among the transactions of the day, and to have been made the same evening or the day following. Such a rule would be certain to a convenient extent. But notwithstanding the admitted discrepancy of the decisions in regard to time, it would occasion more discrepancy to refer the propriety of an actual application to the law.

When the debtor, in this case, assigned the note to the defendants as collateral security, he was silent as to the application of the proceeds of it; and if he desired to have it placed to a particular account, it was his business to say so at or before the time when the money was received. The creditor firm applied it at the moment, and the case is unembarrassed by any consideration of the time; so that we have before us the naked question, whether an application by a creditor can be opened to let in the equity of

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a surety, or the presumptive intention of the debtor. In *Harker v. Conrad*, (12 *Serg. & Rawle* 305), cited for the affirmative, there was no such application; and the remarks of the court were predicated of a very different case. Were there not an actual application in the case for decision, I certainly would not contest the positions of the District Court. The equity of a surety may enter into an open case as it enters into a case of substitution, in which it is treated as a matter resting in mere benevolence, but not suffered to affect the legal right of a third person. But actual application at the proper time, gives a legal right, and the equity of a surety shall not disturb it.

The case of *Dickinson College v. Church*, (1 *Watts & Serg.* 464), which has been mixed up with the discussion, has been wonderfully misunderstood. The question was whether there had been evidence, to be left to the jury, of an actual appropriation to a previous account, in order to entitle the plaintiff to retract a credit given on the face of the claim filed as the groundwork of the lien. The defendant prayed direction that "the payment of \$400 having been credited on the account of materials furnished for said building, the price of which was a lien thereon, could not be withdrawn and applied (to an account for materials furnished) to another building." It is known that these prayers are frequently founded on the assumption of facts contested and sometimes unsupported by evidence; and the doubt was whether the question of previous and inconsistent appropriation was raised by the evidence at all. The court thought it was, and left it to the jury "to determine whether it *was* [to be] so applied." Now, retain the words in brackets, and the sentence is unintelligible; expunge them, and the meaning is clear. Their insertion was probably occasioned by a blunder of the person who copied the record, in making up the paper-book; and they passed through the press without correction, no doubt, because the reporter in the country who made up the case, committed the correction of the proof-sheets to his colleague in town, less familiar with the details of it. The Judge who delivered the opinion of the court, when the cause was here on a writ of error, disposed of the point by saying, that though the testimony ought to be scanned with great severity, there was no error in leaving the fact to the jury; and though the point is obscurely stated, it might readily have been perceived that it was the fact, and not the law, which had been thus left. The truth is, the point was raised by one of those exceptions which are habitually thrown in as make-weights, to multiply the chances of reversal; and it was so obviously untenable, that it was faintly pressed at the argument. The decision was not intended to be a precedent for anything out of the case; and that the point was noticed at all, was because there is a statute which requires us to decide every exception taken below, and because the matter was to go to another jury. The reporter did not expunge it, I presume, because he did not

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consider himself at liberty to mutilate an opinion of the court. This explanation, it is hoped, will prevent the case from being misunderstood in time to come.

Judgment for the defendants reversed; and judgment on the case stated, for the plaintiffs.

Robinson *against* Jefferson County.

Case 243 A county, against which an award of arbitrators has been made, may appeal without the payment of costs.

ERROR to the Common Pleas of *Jefferson* county.

This was an action on the case, by M'Cormick & Robinson against the county of Jefferson; which, at the instance of the plaintiff, was referred to arbitrators, who made an award in their favour for \$170, from which the defendant appealed without the payment of costs. On a rule to show cause why the appeal should not be stricken off, the court below, (M'CALMONT, President), was of opinion that the county might appeal without the payment of costs; and therefore sustained the appeal. The cause afterwards came on to be tried, when the plaintiff gave no evidence, and the court directed a verdict and judgment for the defendant.

The error assigned here was in sustaining the defendant's appeal.

Buffington, for plaintiff in error, referred to the Act of 22d March 1817, (*Sm. Laws* 439); 8 *Serg. & Rawle* 520; 3 *Penn. R.* 65; Act of 16th June 1836, sects. 27, 31.

Banks, contra, cited 9 *Serg. & Rawle* 227; 17 *Serg. & Rawle* 348; 5 *Binn.* 508.

The opinion of the Court was delivered by

ROGERS, J. — Under the former Act of 1810, on compulsory arbitrations, it is ruled in *Carpentier v. The Delaware Insurance Company*, (2 *Binn.* 264), that bodies corporate are entitled to appeal without entering into a recognizance. The grounds of the decision are, that some of the conditions for an appeal, as for example, entering special bail, are incompatible with the nature of a corporation; and as it could not be intended that the Legislature designed to deprive corporations of the benefit of a trial by jury, they had the right to appeal without entering into any

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recognizance. As there is a similar provision in the Act of 16th June 1836, without even the benefit of the proviso, this appeal would be properly entered. But by the proviso of the Act of 16th June 1836, an exception is made in favour of executors, administrators, or other persons suing or sued in a representative character, who may appeal from an award without the payment of costs or entering into a recognizance. It would not be straining the words further than has been done in reported cases, to hold that the words, "other persons suing or sued in a representative character," include the case of a municipal corporation, who must act by their corporate officers, not always in funds to pay costs, and who cannot enter a recognizance in the nature of special bail. But it is said that the latter objection is removed by the Act of 22d March 1817, which provides that when a corporation shall be sued, and shall appeal or take a writ of error, the bail requisite in that case shall be taken absolute for the payment of the debt, interest and costs, on affirmance of the judgment. When we consider that the special object which the Legislature had in view, was monied institutions who were justly supposed to have abused their trusts, and therefore were the object of jealousy, it will perhaps be better to confine the restriction to institutions of that kind, and not extend them to municipal corporations, from whom nothing is to be apprehended, and whom the Legislature would rather foster than restrain by a provision acting as a penalty. But however this may be, it is difficult to believe the Legislature, by the subsequent Act of the 15th April 1834, which enacts that the several counties and townships of the State shall have the capacity of bodies corporate, intended to subject them to a disability, or put them in a worse situation than they were before. It must be recollected that before the passage of that Act counties were in the nature of corporations, and might sue or be sued, and, unquestionably, when sued, they would have had the right of an appeal from an award without the payment of costs, or entering into a recognizance of bail absolute for the payment of the money. The Act was intended to put them in a better, not in a worse situation. The reasons which apply to other corporations do not hold good as respects a municipal corporation.

Judgment affirmed.

Fisk against Sarber.

The assignee of an insolvent debtor is not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate when sold by the sheriff upon a mortgage which encumbered it before the time of the assignment.

ERROR to the District Court of *Allegheny* county.

John Sarber against D. D. Fisk and Fanny Fisk, administrators of Alba Fisk, deceased. The facts and evidence in this cause, which the parties agreed to consider in the nature of a special verdict, were voluminous, and presented several points; but the whole case was ultimately brought to the single point, whether the assignee of an insolvent debtor could, by reason of his fiduciary character, become the purchaser at sheriff's sale of the debtor's real estate, when sold by the sheriff upon a mortgage which encumbered it previous to the date of the assignment and the debtor's insolvent discharge. The court below was of opinion that he could not, and directed a judgment for the plaintiff. The same point was argued here by:

Williams, for the plaintiff in error, who cited 4 *Watts & Serg.* 149; 2 *Whart.* 53; *Peters's C. C. Rep.* 364; 3 *Sugd. Vend.* 237; 2 *Bro. C. C.* 400; 10 *Vez.* 381; 6 *Vez.* 617; *Peters's C. C. Rep.* 335; 8 *Wheat.* 441; 3 *Wend.* 515; 14 *Serg. & Rawle* 357; 9 *Paige* 238; 3 *Wend.* 515.

M'Candless and *Dunlop*, contra, cited 2 *Johns. Chan.* 259; 1 *Stor. Eq.* 317; 12 *Peters* 24; 3 *Vez.* 740; 1 *Ash.* 311; 7 *Watts* 413; 4 *Binn.* 43; 7 *Serg. & Rawle* 230; 7 *Watts* 472; 3 *P. Wms.* 251; 4 *Eng. Con. Chan.* 320; 5 *Watts* 303; 3 *Wend.* 515-16; 2 *Johns. Chan.* 269; 9 *Lond. Jurist* 18; 2 *Whart.* 63; 4 *Cow.* 744.

The opinion of the Court was delivered by

KENNEDY, J. — The facts of the case are presented in a statement made by the parties, and by them to be considered in the nature of a special verdict. From this statement it appears that Abraham R. Woolley, in 1823, was discharged under the Insolvent Laws of this State, and Alba Fisk, the intestate of the plaintiffs in error, who were the defendants below, in conjunction with John Sarber, the defendant in error and plaintiff below, were appointed assignees, and gave bond, with sureties, in the sum of \$1500, conditioned for the faithful discharge of their duty as such assignees. Among the property returned by A. R. Woolley, in his schedule, was a farm No. 6, situated in the vicinity of Pittsburgh, valued

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therein by him at \$8700. This farm was subject to a mortgage, previously given by Woolley to the Bank of the United States, as a security for the payment of \$4750, and not \$3500, as stated in the opinion of his honour, the President Judge of the District Court. Though Woolley, in his schedule, values the farm at \$8700, it is very clear from the case as stated, that it was not considered worth even the amount of the mortgage-debt, and that that sum of money could at no time have been obtained for it, until after it was purchased by Alba Fisk at the sheriff's sale under the mortgage, made upon judicial process sued out at the suit of the bank upon a judgment obtained on the mortgage. His honour, also, seems to have fallen into an error, in assuming that Fisk, while in possession of the farm, before the sheriff's sale, at the instigation of Woolley, under some private arrangement with him as to the division of the profits, made an agreement with the bank whereby the bank was to sell the farm under the mortgage, he (Fisk) to become the purchaser of it, and to give his personal engagement, beside a mortgage on the farm, as a security for the payment of the bank-debt; and afterwards, as he (Fisk) should make sales of any parts of the farm, the bank was to release their mortgage *pro tanto*, on receiving the proceeds of such sales, until their whole claim was paid. This arrangement, says the Judge, was carried into execution in the spring of 1830, and the property or farm was set up at sheriff's sale, knocked down to Fisk, and a deed made to him by the sheriff. Now although a proposition was made in June 1828, by Mr Fisk, in his own name, at the instance of Major Woolley, who was to furnish the money for the purpose of carrying it into effect, to pay the bank \$4750, the amount of the principal of the mortgage-debt coming to it, as follows—\$1000 thereof to be paid on the 1st of September then next ensuing, \$1750 thereof in the course of the year 1829, to be divided into four equal payments, and the remaining \$2000 in three years, with interest—yet this proposition, notwithstanding it is stated to have been acceded to by the bank, and an extract of the minutes of the bank referred to for the purpose of showing that it was so; yet the minutes show nothing of the kind. From them it does not appear that the proposition was ever decided or acted upon by the bank; and most probably so, because Major Woolley seems to have failed entirely in raising the money, as he proposed, without which it could not be carried into effect. The matter then lay over until December 1829, a space of eighteen months, without anything being done towards paying or satisfying the debt of the bank, when the bank, of their own mere motion, as it appears, resolved to proceed and have a sale made by the sheriff, of the farm, if practicable, under their mortgage, and directed that their attorney should be instructed to bid it up to \$4500; but in the event of no person bidding above that sum, that he should cause the sale to be adjourned; and that if Alba Fisk should become the purchaser at

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the sale for a sum exceeding \$4500, the bank would extend the time of payment for five years from the 1st of April then next ensuing, upon his giving his promissory note for the amount of the purchase money, including the costs of sale, bearing date the said 1st of April, payable at ninety days after date, interest to be paid in advance, and to be renewed (interest being paid) every ninety days for five years, if required, for such balance as should from time to time remain due; and the whole to be secured by a mortgage to be given on the premises or farm coterminously with the sheriff's deed.

The bank also further resolved, that on the purchaser's complying with these terms, they would assign to him their mortgage and judgment, and release the said A. R. Woolley from the balance of said mortgage and judgment. And that Alba Fisk, if he became the purchaser, might proceed to sell, from time to time, parcels of said farm or land, and pay the avails thereof, as they should be realized, to the bank, and the bank, upon such payments being made, would release the parcel or parcels so sold, from the operation of their mortgage. The attorney of the bank was accordingly instructed to have a sale made of the mortgage-premises by the sheriff; which was effected under a writ of *levari facias*, to him directed for that purpose, on the 15th of March 1830, to Alba Fisk, for the sum of \$4510, he being the highest bidder, and that the highest sum or price bidden for the same. On the 26th of April following the sheriff consummated his sale by executing and acknowledging a deed of conveyance to Alba Fisk for the farm, who gave his note and mortgage to the bank for the amount of the purchase money, securing the payment thereof in the manner that the bank had proposed anterior to the sale. Fisk, therefore, does not appear to have entered into any arrangement with the bank anterior to the sale, by which he was to become the purchaser or even a bidder at it. For aught that appears, he was at liberty to bid or not, as he pleased; but if he did become the purchaser, he had the assurance of the bank that indulgence would be given him, if he required it, to enable him the more conveniently to pay the purchase money which would be coming to the bank. The bank, evidently not considering the farm worth the amount of the debt coming to them, did this for the purpose of getting as much of it as possible, by giving up \$250 of the principal, beside a considerable amount of interest which had become due. Neither does any arrangement appear to have been made between Fisk and Woolley, whereby the latter was to participate in the purchase, or derive any benefit from it. The whole risk and responsibility of making the purchase and paying the money for it would appear to have been taken by Fisk upon himself. Woolley does not appear to have ever paid a dollar, or to have bound himself to Fisk to do so on account of the purchase, in any event that might happen. The sale, also, by the sheriff to Fisk appears to have

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been perfectly fair ; so that the great question raised in the case, and the only one that need be decided, under the view taken of it by this court, is, whether Fisk, being one of the assignees of Woolley under the Insolvent Laws of this State, had a right to purchase the farm at the sheriff's sale for his own use, and hold it, as the absolute owner thereof. Before entering on the discussion of this question, it may be proper, however, to observe, from the case as stated, that the sheriff's sale of the farm was not occasioned, or did not arise from any neglect on the part of Fisk to perform his duty as a trustee under the assignment for the creditors of Woolley. It was not his fault that the mortgage-debt owing to the bank was not paid, which made it necessary for the bank to proceed upon their mortgage, so as to have the farm sold by the sheriff, for he never had trust-funds in his hands, of sufficient amount, or anything near it, to have satisfied it; and even if he had, it would have been perilous and improper in him to have appropriated them to that end, without paying the other debts of Major Woolley, because the mortgaged premises were not considered equal in value to the amount of the debt mentioned in the mortgage; and the sheriff's sale, with all the aid and inducement that the bank could give, with a view to encourage bidders and to obtain the highest possible price for them, prove fully the inadequacy of their value for that purpose.

Now that a trustee or person acting in a fiduciary character, for the benefit of others, cannot become a purchaser at his own sale, or acquire an interest therein, without the consent of those for whose benefit he has undertaken to act, is a principle too well established to admit of the least doubt. His own interest, in such case, being generally opposed to that of those for whom he is a trustee, would, were he permitted to consult it and act accordingly, almost necessarily, owing to the weakness and infirmity of human nature, interfere with a faithful discharge of his duty to those for whom he had undertaken to act. The maxim, in this respect, is, *emptor emit quam minimo potest, venditor vendit quam maximo potest*. The chancery doctrine, in England, establishing this principle, has received the approbation and sanction of this court, and been acted upon frequently; 3 Binn. 54; 4 Binn. 43; *Leisenring v. Black*, (5 Watts 304); *M'Ginn v. Shaeffer*, (7 Watts 415); *Campbell v. Pennsylvania Life Ins. Co.*, (2 Whart. 53); *Rankin v. Porter*, (7 Watts 390); also in the Circuit Court of the United States in this State; *Prevost v. Gratz*, (*Peters's C. C. Rep.* 373). A purchase, however, by a trustee, is not absolutely void, but voidable merely at the election of the *cestui que trust*, or those beneficially interested in the estate; so that the trustee takes the property subject to the equity of the *cestui que trust* to call upon him within a reasonable time, to account for the profits, or have a re-sale. *Prevost v. Gratz*, (*Peters's C. C. Rep.* 373); *Leisenring v. Black*, (5 Watts 304); *Whichcote v. Lawrence*, (3 Vez. 740);

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Campbell v. Walker, (5 Vez. 678, 13 Vez. 601); 4 *Kent's Com.* 438. The principle that a trustee, properly so called, cannot purchase or acquire an interest in the property for himself at a sale made by him, in execution of the trust, extends to judicial officers and all others, who, in any respects, have a concern in the disposition and sale of the property belonging to other persons; and it is immaterial whether the sale is public or private, judicial or otherwise, or for a *bonâ fide* price. *Campbell v. Penns. Life Ins. Co.*, (2 *Whart.* 53.) I would also refer here to *Davoue v. Fanning*, (2 *Johns. Ch. Rep.* 252), where Chancellor KENT, with his usual industry and ability, has stated the most, if not all the English cases on this subject, down to and during part of the time of Lord ELDON, showing very clearly and distinctly that the doctrine, as laid down above, is the same which seems to be fully established there at the present day. But it is also equally well settled in England, as also by our own decisions, that trustees and others acting under authority conferred upon them for the benefit of others, are only restrained or incapacitated from buying absolutely for themselves, as long as the trust or the authority in regard to the property sold continues to exist, and until notice is given of its having terminated, especially where the trustee divests himself of the trust or authority by his own act, to those beneficially interested in the property. *Campbell v. Walker*, (5 Vez. 678, 13 Vez. 601); *Ex parte Bennett*, (10 Vez. 393-4); *Davoue v. Fanning*, (2 *Johns. Chan. Rep.* 261); *Bartholemew v. Leech*, (7 *Watts* 472). There are cases, in which the party acting in a fiduciary character may, by his own act, divest or discharge himself of the power or trust under which he has acted, at pleasure; but then he will not be permitted to act for his own benefit, in opposition to the interests of those for whom he had previously undertaken to act in the matter, without making known to them the fact of his having relinquished his trust or authority to act for them. *Bartholemew v. Leech*, (7 *Watts* 472). But where he cannot by an act of his own will discharge himself of the trust, so as to enable him to become a purchaser of the trust property, a Court of Chancery, under particular circumstances, will divest him of his character of trustee, and thus enable him, by appointing another to make the sale, to buy and become a purchaser at it for his own use; *Campbell v. Walker*, (5 Vez. 681); or the trust property may be taken out of his hands, and all his authority over it put an end to by the interposition and act of the law, as was really done in this case. *Prevost v. Gratz*, (*Peters's C. C. Rep.* 378). There the late Mr Justice WASHINGTON says; "I know of no principle of equity which will invalidate the title of a trustee to land which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it. This," as he further says, "is precisely like the case of an executor who purchases at a sheriff's sale the personal property of his testator, seized and sold

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under execution. The reasons which forbid a trustee from purchasing the trust property where he himself is the seller, do not apply to such a case." The case there was, that Gratz, the trustee, had purchased a tract of land included in the deed of trust to him, at a subsequent sheriff's sale made under the judgment and execution of one Spears against the grantor in the deed of trust, upon which he had made a profit by a re-sale, and the claim of the plaintiff was for the profit thus made; but the court held him not entitled to it.

If this decision of Justice WASHINGTON be correct, it settles the present case in favour of the plaintiffs in error, and against the defendant in error. That it is correct, and sustainable upon the ground of reason, as well as the authority of analogous cases, can, in my humble opinion, be shown pretty clearly. Where the debt for which the property in such cases is taken in execution, is just, and the property liable to the payment of it, and the trustee without funds in his hands, or power to pay it, so as to relieve the property, what can he do? He is certainly not required to advance moneys out of his own pocket for the purpose of redeeming it; and it being taken out of his possession, as it were, and certainly out of his power, by the authority of the law, which is paramount to any that he has as trustee, and placed in the hands of the officer of the law, to whom full power is given to sell and dispose of the same, it is perfectly manifest that he thereby becomes divested of his trusteeship in regard to it; that all his power and control over it cease; so that he has no duty whatever to perform in respect to it in the slightest degree incompatible with his buying at the lowest price for which it may be obtained; and as to the sale to be made by the sheriff, it is impossible to conceive how the trustee can exercise any control or influence over it to the prejudice of those whose interest it is to have the property sold for the highest possible price, that any other individual disposed to buy may not exert. I have said already that it is not even his duty to attend the sheriff's sale in such case, or to give any attention to it whatever; because if it be, he would be entitled to claim compensation for his doing so; but where there is no other trust property than that sold by the sheriff, which does not sell for a price sufficient to satisfy the execution and lien creditor, it will scarcely be pretended that the trustee would be entitled to receive compensation for his trouble in attending the sheriff's sale, out of the moneys arising from it in the hands of the sheriff, to the prejudice of the lien creditor. He is not known or recognised as having any agency in effecting the sheriff's sale, and therefore cannot claim any compensation on account of it; but the sheriff, who is considered the sole and only agent for making the sale, is entitled to be paid his fees or compensation for his trouble, out of the money arising from the sale, before the execution-creditor can receive any portion of it. But it is objected that the trustee, in

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such case, may collude with the execution-creditor, and perhaps the sheriff too, so as to buy the property at an under-value, or reduced price; and hence public policy requires that he should not be permitted to become an absolute purchaser of the property for his own benefit. This, to be sure, is a most sweeping objection, and would go to exclude every other person from buying for his own use; for the trustee has no means of influencing the execution-creditor or the sheriff to do anything improper in regard to the sale, that any other person may not be possessed of; and if he does exert an influence of the kind successfully, there is no reason why it cannot be as easily discovered as if exerted by any other; so that there is not, as it appears to me, the least show of reason for this objection.

Another objection is, that from his connection with the property as trustee, he may have acquired a knowledge of secret and valuable properties belonging to it, calculated to enhance the value of it in the estimation of those who may be disposed to buy; and therefore public policy demands that he should not be induced to suppress his knowledge in this respect, if he has any, by becoming a purchaser at the sheriff's sale absolutely for his own benefit. It may be that there is some plausibility in this objection; but then it must be observed that it is founded on the assumption that it is the duty of the trustee to attend the sheriff's sale, and make such properties, if they exist in his knowledge, known to bidders, and those generally attending the sale, though he cannot claim and receive any compensation for doing so. It is obvious such a requisition on the trustee would therefore be unreasonable and unjust, and can or ought not to be exacted. But Courts of Chancery have never regarded this objection as being, at most, entitled to the same weight that is attempted to be given to it here. For if it were to be regarded as valid, it would even prevent a trustee from becoming a purchaser of property of which he had been the trustee under an order of the court granting him leave to buy; or rather, it would prevent Courts of Chancery, in all cases, from ever granting such leave. But it is the constant practice of a Court of Chancery to grant such leave, where the trustee evinces a disposition to give a higher price for the property than any other seems willing to give; and yet this disposition to give a higher price than any other, may, for aught that appears to the court, proceed from his knowledge of valuable properties belonging to the estate, that is known to nobody excepting himself. Such matter is never inquired into by the court; and the non-existence of any such knowledge on the part of the trustee, does not appear to enter into the consideration of the court, in making an order authorizing him to become a purchaser, if disposed to give the highest price. *Campbell v. Walker*, (5 Vez. 678, 681.)

In practice, therefore, this second objection seems to have no weight or validity attached to it. It will not be pretended, I

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presume, that a trustee, who is constituted such for the purpose of selling and disposing of an estate, is bound to suppress or keep secret, in doing so, any defects which he may discover in the title to it, or secret bad properties belonging to the estate itself. Truth, which is the basis of all moral excellence and fair dealing between man and man, would rather seem to require that he should disclose them in the course of a sale made by himself; but certainly, when the sale and trust are taken out of his hands, he would not be required to attend a sheriff's sale for any such purpose. A trustee, appointed for the sale of an estate, is altogether unlike, in this respect, to an attorney-at-law or counsellor, who is consulted as such, in regard to the title of an estate, by the person in possession and claiming to be the owner of it. If defects in the title are discovered, upon such occasion, by the attorney or counsellor, he is bound to keep them secret, and not to disclose them; nor will he ever be permitted to secure a benefit to himself, by means of his knowledge so acquired, to the prejudice of his client. The difference between the duty, in this respect, of a trustee for sale and an attorney or counsellor, is founded on reasons too obvious to require them to be mentioned, though both may be said to stand in a fiduciary character. In some other respects, their duties are alike, and the same rule applicable to both. The case of a solicitor in bankruptcy has been mentioned as coming under the same rule with the assignees, and disqualified from purchasing any of the bankrupt's property for his own use absolutely; though, as it is said, he has no control over the sale, nor anything to do with it. It is true that the property which did belong to the bankrupt is vested in the assignees, and that the sale and transfer thereof must be made by them; but it is also equally true that it is the duty of the solicitor, in point of law, to insist that the assignees shall make the utmost value of the property; *Ex parte Lacey*, (6 *Vez.* 629); and, that this end may be attained, it is further his duty to examine the title to the property, ascertain its value, and not to suffer it to be brought to sale until all the information that can be acquired, in this respect, is obtained for the benefit of the assignees, under the circumstances likely to make it yield its utmost value. *Ex parte Bennett*, (10 *Vez.* 385). And hence Lord ELDON observes, in this last case, that perhaps he is, upon principle, the individual, of all others, disabled to purchase. See also *Ex parte James*, (8 *Vez.* 346).

The case of *Van Epps v. Van Epps*, (9 *Paige* 238), has been cited by the counsel for the defendant in error, and much relied on to sustain their side of the question. The defendant, in that case, being a trustee in a mortgage for \$6000 on a property, which three years before had been sold for \$15,000, became the purchaser thereof for his own use, at a sale made of the same by a master in chancery, under a decree of foreclosure on a prior mortgage of \$5000, with some interest due thereon, for \$6450, a sum, perhaps,

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not much more than sufficient to cover the debt and interest due on the prior mortgage; and it was held by the chancellor that he was not capable of purchasing the property absolutely for his own benefit. The chancellor, in delivering his opinion, says, it was the duty of the defendant, as the trustee and holder of the junior mortgage, to make the mortgaged premises, if possible, produce upon the sale sufficient not only to pay off the prior encumbrance and the costs of foreclosure, but also to satisfy the subsequent encumbrance, which he held in his fiduciary character. Now if the master in chancery had the sole and exclusive power entrusted to him of making the sale, and it was his duty, as in the case of a sheriff selling under judicial process, to obtain the utmost price that could be had for the property, it is not easy to perceive why it was necessary for the defendant to attend the sale, or how it was possible for him to aid in raising the price, except by bidding for the property; but surely it will not be pretended that he was bound to do this, unless he could do it for his own benefit. It would seem, however, that the chancellor did not consider the entire responsibility of obtaining the highest price that could be had for the property as resting with the master, as is certainly the case with the sheriff who makes a sale under judicial process, but that it was divided between the master and the defendant in some way; and therefore the purchase by the defendant for his own use came in conflict with his duty as trustee, which rendered him incapable of holding it. Yet in England, a mortgagee is allowed to bid under an order in chancery for the sale of the mortgage estate, *Ex parte Marsh*, (1 Madd. Chan. Rep. 148, in note), which shows that he is not considered there as having any control over the sale which could tend to depress the price, and that the master appointed to make it has the entire direction of it, so as to obtain the highest price for it; so a creditor in England, taking out execution, may, according to the rule established in equity, as well as at law, become a purchaser of the property seized under it, whether it consist of goods or leasehold, because it is the sheriff, and not the creditor, who sells. *Stratford v. Twynam*, (1 Jacob 418). The chancellor, in *Van Epps v. Van Epps*, says, the result of the conflict between the private interest of the defendant and his duty as trustee, was, that a farm which in April 1837 was sold for \$15,000, was, within three years from that time, bid in by him for the comparatively small sum of \$6450. If this had been shown in any way to have been the case, for it does not necessarily, nor can it even probably be inferred, as resulting from the mere circumstance that the defendant was a trustee, upon any natural or rational principle, it would have been a plausible ground, at least, for deciding against the defendant; but as it was, I must confess, that I am not prepared to approve the decision; for it does appear to me that the property was taken out of the hands of the defendant and placed altogether beyond his control or influence, as a

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trustee, so that he had no duty as such to perform in regard to it, and that his bidding for it was necessarily calculated to raise, and not to depress the price.

Seeing, then, that Fisk, as I think I have shown, had no duty to perform whatever, in regard to the sheriff's sale of the property, in the case before the court, that would possibly conflict with his buying it for his own use, there seems to be no ground upon which he ought to be considered disqualified to do so. His becoming a bidder with a view to buy at the sale, increased the competition in bidding for the property, and necessarily tended to raise the price, so as to promote the interest of all concerned in its bringing the utmost cent of its value. It was for the purpose of promoting this great end, that the rule was established which prevents trustees, as also judicial or executive officers, and all others acting in a fiduciary character who are entrusted with the selling of property for the benefit of other persons, from buying thereat for their own use; but when they cease to have any power over, or concern with the sale, and it is to be made by another legally appointed for that purpose, to whom the whole management and direction of it is entrusted, the rule becomes wholly inapplicable. Hence, in this State, it has ever been held, that an executor or administrator may purchase the lands of the deceased, taken in execution and sold upon judgments obtained against such executors or administrators, for debts justly due, where they have no assets in their hands with which they can pay them; and this, too, before the passage of a late Act of Assembly, even where the executor was a devisee in trust under the will to sell the estate for the purpose of paying the debts of the testator. In *Riddle v. Murphy*, (7 Serg. & Rawle 230), where the administrator with the will annexed purchased the land of the testator taken in execution and sold by the sheriff on a judgment confessed by the administrator, for a debt said not to be owing at all, and where he had assets sufficient in his hands belonging to the estate to have paid it, if it had been just, the sale, though held void, was held so on the ground of fraud in the administrators; and from the report of the case, it is clear that it never entered into the minds of the counsel opposed to the sale, or of the court, that the sale could be avoided upon any other ground than that of the fraud, shown to have been practised by the administrator.

So it is the practice for judgment and execution creditors to become the purchasers of either the personal or real estates of their respective debtors, at sales made of the same at their instance, on their executions by the sheriff, the propriety and legality of which has never been, and certainly, at this day, cannot be questioned; yet such practice is, perhaps, obnoxious to an objection somewhat plausible, to say the least of it. For every one, of any experience in this matter, knows that the plaintiff in the execution has, and may exert a control over the sale, to a limited extent,

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that no one excepting himself can, by directing the sheriff to proceed to make the sale without delay, or to forbear until he shall give him further orders; and it is easy to perceive that the plaintiff in the execution, by the exercise of this control, may frequently purchase the property, if he wishes it, at a lower price than he could otherwise do, to the injury of the debtor and possibly of other creditors. The principle that he may purchase, was ruled also in New York, in *Sheldon v. Sheldon*, (13 Johns. 220), where in fact, too, he was a trustee for the creditors of the defendant, and next for the defendant himself, in the judgment and execution under which the property was sold. There, A. confessed a judgment to B., and B. covenanted to sell the property of A. under the judgment and apply a sufficiency of the proceeds to the payment of A.'s debts, and account with him for the remainder; and it was held by the Supreme Court of that State, that B. might himself become the purchaser at the sheriff's sale under the execution sued out on the judgment; and that he was not accountable to A. beyond the sum for which the property was sold to him, though he had made a profit by a re-sale of it. Now, in principle, it appears to me, that this case cannot be distinguished from the one under consideration. And why did the Supreme Court of New York so hold? Clearly because the sale was under the exclusive and entire control of the sheriff, whose duty it was to obtain the best price he could for it. It was likewise held by the same court, in *Jackson v. Woolsey*, (11 Johns. 446), that a guardian *ad litem* in partition, might become a purchaser, at a sale made by the commissioners appointed for that purpose, pursuant to an order of the court; because, says the Judge, in delivering the opinion of the court, "it was a public sale to the highest bidder, authorized by statute, and under the sanction and inspection of the court; therefore, without circumstances of direct fraud to support the allegation of its being void, it is valid in law." Now all this is literally true, and may be affirmed of every sheriff's sale made of real estate in this State, under judicial process. Indeed it is perfectly obvious that the principle and grounds of all the decisions on this subject go to show, most incontestably, that no one is incapable of purchasing property taken in execution at a sheriff's sale, though he may have stood in the relation of a trustee to it, unless he be the sheriff himself, his agent, or some one who has rendered himself incapable of buying for his own use by his having become the agent to buy for another. And the reason of this incapacity is obvious, in either case; for to permit the sheriff or his agent to purchase, would be making it his interest, which generally governs all men, to sell the property at as low a price as possible, instead of the highest; the law, therefore, wisely places him beyond all temptation to violate his duty, by rendering him incapable of buying either directly or indirectly. To permit one to purchase for himself, who has undertaken to buy for another, would be

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permitting him to deceive and perpetrate a fraud, which the law abhors and will never sanction. So with regard to a person other than the sheriff or his agent, buying property at a sheriff's sale, it is laid down by this court in *Haines v. O'Conner*, (10 Watts 320), that a purchaser at sheriff's sale, who has paid the money, can only be held a trustee *ex maleficio*, on account of the existence of fraud, and when that is the case, he will be considered a trustee for the creditors and the debtor also, unless the debtor be *particeps criminis*. This principle is again recognised in *Fox v. Heffner*, (1 Watts & Serg. 376).

But in the case under consideration fraud is out of the question, for the sale appears to have been public, made upon due notice previously given by the sheriff, of the time and place appointed for that purpose, where Fisk was the highest bidder, and became the purchaser upon the strength of his own credit and responsibility, and accordingly satisfied the bank for the purchase money, to whom it was all coming, by giving them his note and a mortgage for the amount on the property sold to him. This, it is true, was done in pursuance of a proposal made by the bank anterior to the sale to Fisk, in case he should become the purchaser of the property at a sum exceeding \$4500, but without any solicitation that appears on the part of Fisk to do so. But had there been a previous agreement between the bank and Fisk, to arrange the payment of the purchase money in the manner it was done after the sale, it would not have altered the case, for the bank had an unquestionable right to have bought itself at the sheriff's sale, by bidding the highest price, without paying any money other than the costs, when the price bidden fell short of the amount of their debt; and certainly any right that it had, in this respect, it could give on such terms as it pleased to Fisk. Indeed, the real motive of the bank for doing as it did with Mr. Fisk, is obvious; for from the whole of the case, it appears pretty clearly, that it despaired of getting a bid sufficient to cover the amount of their debt or claim from any person for the property, or even getting, at most, more than a dollar or so above \$4500, \$250 less than the amount of the principal of their debt, without including the interest due on it, excepting from Mr Fisk, and that, under this impression, the bank, in order to obtain from him, if possible, \$4500 of their debt, proposed to give him time for the payment of the purchase money, so that if he purchased he might, if possible, make it out of the property by re-selling it. This was not only fair, but was well calculated to promote the interests of both Woolley and his creditors, by obtaining the highest price for the property that could be had for it under existing circumstances. The judgment of the court below is, therefore, reversed, and a judgment rendered by this court, on the case stated, for the plaintiffs in error against the defendant in error.

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ROGERS, J., *dissentiente*.—It is not my intention to analyze the testimony, although, in my apprehension, there would be no difficulty in proving that the facts in evidence disclose a case of combination between Woolley, the insolvent debtor, and Fisk, the assignee, to become the purchaser of the real property of the insolvent estate at a price which subsequent events have shown, was greatly below its real value, of which they, from their superior means of information, were well aware before and at the time of the sale. It could, also, I think, be further made apparent that the judicial sale, though nominally under the superintendence of the bank, was really under the control of Fisk, in consequence of a private and secret contract between them, and that in truth the sale was, in form, a means of conveyance adopted by the parties to cover the real transaction, and having the title passed to them under the sanction of a court of justice. If such was the state of facts, it is admitted it would bring the case within the principles assumed by a majority of this court. But I do not rest my objection to the judgment on that ground, but I take leave to protest against the broad principle for the first time held by this court, that at a judicial sale a trustee has the same right as any other individual to purchase the trust estate, with the single exception of an execution issued by himself or where in some manner the sale is subject to his government and control. In other words, according to the principles now asserted, the trustee must be both buyer and seller to invalidate the sale; that it cannot be impeached except by proof of actual fraud.

This, it is believed, is a fair statement of the principle ruled by the court, and it amounts to this: that the assignee of a bankrupt or insolvent estate, an assignee under a voluntary assignment, a trustee under an express or implied trust, an executor, a guardian, an attorney in fact or at law, in short, all and every person acting in a fiduciary character, has the same authority, and with the like consequences only, to purchase the trust property, as any other person, however disconnected with it, at a judicial sale, with this reservation only that he is prohibited from becoming the owner when he has the control of the sale, or, in other words, stands in the category of both buyer and seller; that the well established and wise rule, which prohibits the trustee from purchasing the trust estate during the subsistence of the trust, does not apply to such a case, but only exists where he has placed himself in the predicament of vendor and vendee. This is a limitation, with all due respect, of modern growth. It certainly never entered into the heads of the sages of the law, who have taken so much pains to explain and vindicate the reason and policy of the rule. If such an exception is admitted, it would readily occur to them that in a most numerous class of cases, which enter into the common transactions of life, *cestui que trusts* are entirely at the mercy of fraudulent trustees, who can plunder them without stint or limit, without

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any effectual restraint or redress whatever. If the rule is so necessary and salutary, as it is uniformly declared to be by every jurist who has touched the question, is it not passing strange it should be restricted in its operation in a class of cases much the most numerous, and requiring at least as much protection from the effects of artifice and fraud? I will readily admit that in many, perhaps most of the cases, it has happened that the trustee was both seller and buyer; but, with deference, I submit, that the rule does not depend on that circumstance, but has its foundation in reasons much more extensive and comprehensive. And this, in my opinion, is most apparent from the rule itself, which covers more ground, and from the reasons given by the Judges in vindication of the rule, which they take unusual pains to enforce.

The principle uniformly held is this. *A trustee cannot act for his own benefit on a subject connected with the trust, during the subsistence of the trust.* No party can be permitted to purchase an interest in property, and hold it for his own benefit, *when he has a duty in relation to such property* which is inconsistent with the character of a purchaser on his own account, and for his individual use. That during the time the relation subsists, the trustee cannot, without the assent of the *cestui que trust*, put himself in a hostile attitude to the *cestui que trust*. *Van Epps v. Van Epps*, (9 Paige 241). "It is not sufficient," says SERGEANT, Justice, (*M'Ginn v. Shaeffer*, 7 Watts 415), "for a party, who has been clothed with a fiduciary character, to intrench himself in forms of law. Equity follows his character throughout, and clothes him with it, notwithstanding his endeavours to shake it off, in order that he may enjoy advantages derived from that character to the injury of others for whom he has acted. There is but one recognised path for a trustee to walk in, and that is, that all his views and conduct be directed to a faithful discharge of his duty as such; and where his acts may admit of two constructions, one rightful, the other tortious, in respect to his *cestui que trust*, equity will choose the former and reject the latter." The case of *Keech v. Sandford*, (*Select Cases* 61), is a strong case in illustration of the rule. There Chancellor KING held, that where there was lease of a market devised to a trustee for the benefit of an infant; lessor before expiration of the lease refuses to renew to the infant; trustee takes it himself; he shall be obliged to convey to the infant and account for the profits.

So much for the rule; and now for the reason of it. The principle has been adopted in chancery to prevent fraud, and moreover, to avoid as far as possible the temptation even to commit fraud. There may be, as is said in all the cases, the most satisfactory evidence that the transaction amounts to no more than what the general interest of justice requires, yet the trustee shall not be permitted to purchase for himself or another; because the powers of the court would not be equal to protect against decep-

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tion in many cases, from the impossibility of ascertaining the truth in all cases. Moreover, to permit a trustee to bid, would be applying the information acquired by the trust to his own benefit. It is not necessary to show that the trustee has made any advantage by the purchase, for in *Ex parte Bennett*, (10 Vez. 385), it is said, if a trustee may buy in an honest case, he may buy in a case having that appearance, but which, from the infirmity of human nature, may be grossly otherwise; and yet the power of the court would not be equal to detect the deception. Human infirmity will rarely permit a man to exert against himself that providence which a vendor ought to exert, in order to sell the estate most advantageously for the *cestui que trust*, and which a purchaser is at liberty to exert for himself, in order to purchase at a lower price. It is further said that these principles should be enforced, to protect the rights of persons so circumstanced; for otherwise the temptation to fraud would be irresistible; and it is well known that no court is equal to the examination and ascertainment of the truth in much the greater number of cases. 10 Vez. Jun. 381; *Davoue v. Fanning*, (2 Johns. Ch. R. 252); *Hawley v. Cramer*, (4 Cow. 717); *Greenlaw v. King*, (5 Lond. Jur. 18).

The existence, therefore, of actual fraud is not required, for however fair and unexceptionable the conduct of the trustee may be, however adequate the price, yet the *cestui que trust* may, although the contract is not void, still consider the trustee clothed with his fiduciary character. The rule is intended to prevent fraud, and also to lessen the temptation to fraud, by affording no inducement to the trustee to act other than for the benefit of the beneficiary, inasmuch as he may lose by his purchase, but cannot gain by it. And also from the impossibility, in numberless cases, to unravel actual fraud, although it may exist in its rankest and most offensive form. The principle applies, however innocent the purchaser may be; for it is, as Chancellor KING says, poisonous in its consequences. The *cestui que trust* is not bound to prove, nor is the court bound to decide, that the trustee has made a bargain advantageous to himself. The fact may be, and yet the party may not be able to show it. It is to guard against the uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule permits the *cestui que trust* to come in at his own option, and without showing essential injury, to insist upon having the experiment of another sale, or that the purchaser may be decreed a trustee and made to account for the profits. The prohibitions, the wisdom of which has been repeatedly shown, arise from the subsisting relation of trusteeship, nor can they be dispensed with until the relationship is completely dissolved, unless by clear, unequivocal assent of the beneficiary. It will not be denied that this observation applies not only to trustees, strictly so called, but to all persons standing in like situation, such as assignees, and solicitors of a bankrupt or insolvent estate, who are

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never permitted to become purchasers at the sale of the bankrupt or insolvent estate.

But these principles, which are so firmly established by a long train of decisions, and which have been so anxiously preserved, are now, in my judgment, of but little practical worth, because under the decision just made, they can, and inevitably will be secretly evaded, and almost without the possibility of detection. All that will be necessary, for example, for an assignee of an insolvent debtor or an assignee under a voluntary assignment to do, when he desires to possess himself of the insolvent estate, will be to *permit* or *procure* a judicial sale; and this, it is obvious, he may readily do with but little chance of detection. He may then, almost beyond the possibility of prevention, do by indirection, by neglect of duty, by fraudulent procurement, that which, it is confessed, he cannot do directly. When this doctrine is announced and generally understood, we shall hear no more of sales by trustees, assignees, or guardians, when the estate is, as here, known to the initiated to afford a chance for speculation. It would be a waste of time to run the argument out on this view of it. Its alarming and pernicious consequences must at a glance strike the mind of every man acquainted with the operations of the human heart, and the facility with which fraud, in such cases, may be committed without the possibility of discovery. It is only necessary to suggest it to feel its force. You will find all such sales conducted with the most scrupulous regard to unessential forms, where the sale is conducted nominally by the sheriff and creditor, really by the trustee; or when really by the creditor, but little attention will be paid to the manner of sale. Having determined to purchase for his own benefit, why should he care to what extent the estate has been depreciated in price by artful misrepresentations, by irregularity in conducting it, and fraudulent practices either by himself or others? We cannot expect him to complain of the cause which has operated so much to his own advantage. What court is competent to ascertain whether the catastrophe has been caused by his own breach of faith? It is to prevent this the rule is so strenuously insisted on. It is founded in a jealousy of the trustee, and upon the possibility, at least, that he may be guilty of a fraud which it is difficult for a court to detect. Can it admit of doubt, that if we relax the rule to the extent claimed, the interest of creditors and of debtors must inevitably fall a sacrifice to the cupidity of fraudulent assignees? In my judgment, this is not the time to increase the temptation to commit fraud. It is the duty of the assignee, when he has funds in hand, or can procure them by reasonable diligence, to pay a debt pressing on the estate, and relieve it from a forced sale; and when he purchases and is chargeable with any neglect of the nature stated, it will hardly be denied, equity will declare him accountable for the profits. But what a temptation does this present to falsify his accounts, and by

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such means conceal a fraud which would inevitably strip him of his ill-gotten gains. In whatever aspect the proposed relaxation of the rule is viewed, it is pregnant with consequences most alarming and disastrous to the best interests of society.

But, it is said, that upon proof of actual fraud, the creditors may be relieved. But may not the fact be so and yet the party not able to show it? And is it not to guard against this uncertainty and hazard of abuse, and to remove the trustee from temptation, that the rule permits the *cestui que trust* to consider the trust as still subsisting? That the duties of the trustee continue during the existence of the trust, is supported by all the authorities; and if this be undeniable, which I maintain it to be, the advocates of the adverse doctrine are reduced to this position. They must maintain, that where the property is *in gremio legis*, in the custody of the sheriff, so far as that property is concerned, the relation of trustee and *cestui que trust* is *ipso facto* defunct; that the trustee may abandon all care of the estate and hand it over to the tender mercies of the sheriff or creditor, under whose execution it is sold; that it is no longer the duty of the trustee to see that the best price is gotten for the land. With all due respect, in my judgment, this is a most alarming proposition, neither supported by reason, principle or authority. Is it not the duty of the assignee to see that the sale is properly conducted, according to all the forms of law, to guard, as far as human prudence can, against fraud, trick, artifice, chicanery, and gross sacrifice of the property? Would it not be his duty, in case the property was sold for a trifle, in comparison with its value, and particularly if there was reason to believe it had been procured by management, to ask for a re-sale? What would be thought of an assignee who would fold his arms and pay no further attention to an estate, on the flimsy and dishonourable pretext that the estate was in the hands of the sheriff, and he was not bound on principles of law, honour and honesty, to take further care about the property? Nay more, under such circumstances, to have the assurance himself to become the purchaser for his own benefit? Would not every honest and honourable mind abhor such conduct? Take the case of guardian and ward, for the principle now assumed, monstrous as it is, must be held to extend to it. Let us suppose a man dies leaving a large real estate encumbered with debts, a minor child and a faithless guardian, who, in consequence of his knowledge of the intrinsic value of the estate, a knowledge derived, it may be, from his parental relation, desires to become the owner. He *procures* or *permits* a suit to be brought by one of the creditors, and this, it must be allowed, can be readily done, judgment is obtained by his *permission* or *connivance*, an execution is issued and the property is seized, condemned, and in the hands of the sheriff; is it the law, I ask in the name of all that is just and sacred among men, that the fiduciary character of guardian is

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ipso facto gone, that he is at liberty to become the purchaser of the estate and hold it discharged of the trust? If this be so, it is very obvious that minors have but little protection from the acts and frauds of corrupt guardians. Who, I ask, is left to protect the interests of the minor, if his guardian can withdraw himself from the duty which the law has imposed upon him, and which he has voluntarily assumed, and put himself in a hostile attitude to his ward? If in the case supposed there has been any irregularity or fraud in the manner of the sale, and the property in consequence thereof has been sold for less than its intrinsic value, who is to ask the interposition of the court to protect the interest of the helpless ward, when the very person who stands in *loco parentis*, has put himself in an adverse position to him; in a position in which he has interests of his own, inconsistent with his fiduciary character? But what is the apology for this novel doctrine, by which one of the most salutary and wisest rules will be effectually overturned? It is founded on the notion that where the land is in *gremio legis*, the relation of trustee and *cestui que trust* ceases; but this, I think, I have shown already, is a most fallacious idea. The trustee, it is true, is not bound to advance his own money and purchase the land, but still he has a duty to perform in relation to the property and to the interest of the *cestui que trust*. The relationship still continues. He is bound upon principles of common honesty to use every reasonable exertion to obtain the best price for the property, and to do all other things which may promote his interest.

It is also alleged that it is an advantage to the beneficiary to permit the trustee to purchase, as it adds one more bidder to the list. But the law has wisely said that this leads to fraud, and it is far better for the interests of the beneficiary that the trustee should not be put in the way of temptation; that so far from being a benefit, in numberless cases, it will prove a serious detriment to the *cestui que trust*. And what says Chancellor KING, in *Keech v. Sandford*, (*Select Cases* 61), before cited? That, it will be remembered, was a lease of a market devised to a trustee for the benefit of an infant. The lessor, before the expiration of the lease, refused to renew to the infant; and the trustee took it to himself. The chancellor says; "I must consider this as a trust for the infant; for I very well see, if a trustee on the refusal to renew might have a lease to himself, few trust-estates would be renewed to *cestuis que use*. Though I do not say there is fraud in this case, yet *he should rather have let it run out than to have had the lease to himself*. This may seem hard, that the trustee is the only person of all mankind who might not have the lease; but it is very proper that rule should be strictly pursued, and not in the least relaxed; for it is very obvious what would be the consequence of letting trustees have the lease, on refusal to renew to *cestui que use*." So here, others may purchase, but an inflexible rule of policy forbids

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the trustee to become the purchaser. Besides, if this argument proves anything, it proves too much, as it is obvious that the same reason, if worth anything, holds good even where the trustee is buyer and seller, or where he orders and conducts the sale. It strikes at the very foundation of the rule itself, which it acknowledges is founded in wisdom, and established by an overwhelming current of decisions.

Another argument has been used, equally unsound. A creditor, it is said, may purchase at a judicial sale; and this is true, although he may have issued the execution, and have the control of the sale; so that this class of cases, in my judgment, proves nothing to the purpose; and if they do, they overturn the rule itself. But this admits of another answer, equally satisfactory; the reasons of the prohibition do not extend to creditors. 1. Because of the want of any fiduciary relationship between debtor and creditor; and next, because where he is guilty of any irregularity or fraud in the sale, or where the property has been sold at a sacrifice, a re-sale may be ordered by the court, on the application of the debtor or the other creditors. But this cannot be done by a minor; and it is unreasonable to expect it to be done by other creditors, or by the debtor, when the care of their interest is committed to a legal assignee or trustee, who, they have a right to expect, will diligently attend to the sales, and who they cannot suppose will voluntarily place himself in a situation inconsistent with his confidential character. By the acceptance of the trust, he pledges his honest endeavours to promote the interest of the *cestui que trust* by disposing of the property. The creditors may, therefore, very well suppose that, as an honest and conscientious man, he will not create in himself an interest inconsistent with this pledge, or put himself in an attitude which may seduce him from an upright fulfilment of his duty.

And thus the case stands on principle and on reason; and now let us inquire whether the same positions are not supported by authority. But before examining the cases more particularly applicable on this head, let me remark, that all these cases of a purchase at a sheriff's sale where the contest is between the purchaser and the debtor or the creditors, are aside of the question. They depend on the *mala fides* of the purchaser; and as there are no confidential relations between them, there is no rule of policy which forbids the purchase. There the ingredient to avoid the sale must be the proof of actual fraud. There is nothing from which the law infers legal fraud. The question we are considering is the rule, and the extent of it, which obtains, where a trustee or a person standing in a fiduciary character, such as an assignee for the benefit of creditors, or a guardian, &c. undertakes to purchase the estate of his beneficiary during the subsistence of his trusteeship, and contrary to, or without the assent of the *cestui que trust*. In considering this question, it must never be forgotten

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that the true rule is, that being a trustee once, he cannot divest himself of that character and become a purchaser for his own benefit, whether the sale be public or private, judicial or otherwise, or whether he be the buyer or seller, or whether any other person conducts the sale. That being a trustee at the time of the purchase, he is held still to remain a trustee to all intents and purposes. And this rule a wise policy requires should be without exception, for otherwise the rule is worthless in a class of cases most numerous and useful, which enter into the business transactions of a commercial community. As has been before observed, I will readily admit that in most of the cases in which these principles have been held, the trustee has been both buyer and seller; yet in none has it been said, or intimated, that on that alone the principle depended.

The reasons adduced in support of the principle have a more extended and general application, and have been applied to the trustee during the subsistence of the trust, who is prohibited from purchasing for himself, without any reference to the accidental circumstance that he was at the same time the seller as well as the buyer. None of the cases, when fairly considered, will bear that construction, and it would be very unfortunate that they should receive such a narrow and confined interpretation, as the necessary consequence will be so disastrous to a helpless class of the community by evasion, fraud or artifice, without almost the possibility of detection. We all know how difficult it is to unravel the web of fraud, and particularly difficult will it be for creditors, dispersed, as they generally are, who cannot act in concert, and must be, even with all the guards we can put round them, very much at the mercy of an assignee who desires to appropriate the property of the debtor to his own use. How will it be possible for them to guard against a combination such as there is very good reason to believe existed here? In no possible way can it be done, except by adhering rigidly to the rule that an assignee shall make nothing out of the estate for his own benefit, let the sale be conducted in what manner it may, whether public or private, whether by him or at the instance of another. It is admitted that even if it be a judicial sale, yet if the trustee has the control of the sale, he cannot purchase; so that the principle is made to depend upon the fact that the trustee is buyer and seller; as, for example, where the property is sold on his execution, or where he has in some manner the control of the sale.

If, therefore, I am able to show that he has been held a trustee notwithstanding he was neither buying nor selling, nor had any manner of interest in or control of the sale, it seems to me, that on authority, as well as principle, there is an end to the distinction. I will not say that the doctrine is altogether without authority; for there is one case in which the principle is said not to apply to a judicial sale without any qualification whatever. I refer to the

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decision of Judge WASHINGTON, in *Prevost v. Gratz*, (*Peters's C. C. R.* 364). According to that case, it is enough that it is a judicial sale; for where that is the case the trustee is at liberty to purchase and hold the estate discharged of the trust. But in the extent of the exception, it is conceded that the learned Judge is mistaken; for not to insist on the admission here, it is in direct opposition to *Riddle v. Murphy*, (7 *Serg. & Rawle* 230); *Lazarus v. Bryson*, (3 *Binn.* 59); *Moody v. Vandyke*, (4 *Binn.* 31; and *Van Epps v. Van Epps*, (9 *Paige* 240); *Swayze v. Burke*, (12 *Peters* 24); to which may be added numerous other authorities. The truth is, and I say it with all due respect, that *Prevost v. Gratz*, as to this point, was a hasty decision. It appears not to have been argued, and not to have been considered, either upon principle or authority, with that care which the very great importance of the principle required. It seems that the claim was made against Gratz by the complainant's counsel, but it was not seriously pressed. It is, therefore, not wonderful that it was not very seriously considered. The learned Judge dismisses it with the observation, "that he knows of no principle of equity which will invalidate the title of a trustee to land which the law has taken out of his hands, and which he purchased from one appointed by the same authority to sell it. This is precisely like the case of an executor who purchases at a sheriff's sale the personal property of his testator, seized and sold under an execution. The reasons which forbid a trustee from purchasing the trust-property, where he himself is the seller, do not apply to such a case."

The learned Judge evidently proceeds upon the hypothesis, that when the land passes into the hands of the sheriff, all care on the part of the trustee ceases; that the relation of trustee and *cestui que trust* is at an end, and that therefore he may create an interest in himself, although inconsistent with his pledge, and although it may seduce him from an upright fulfilment of his duty; that he is no longer bound to use his honest endeavours to promote the interest of the *cestui que trust* by acquiring for the property the best terms which can be obtained for it. The fallacy of that notion I have endeavoured to show, and its inevitable consequences; that it, in effect, will destroy the rule itself, and leave a large class of persons, and much the most numerous, to the tender mercies of assignees and others placed in confidential relations to them. I differ totally from him in the assertion that the reasons which forbid a trustee from purchasing the trust-property, where he himself is the seller, do not apply to such a case. That is an assertion without an attempt to support it by law, which I cannot comprehend; for, in my judgment, all the reasons, except one, apply as well to a judicial as to any other sale. The rule does not depend on the sale, or by whom it is made, but upon the person who becomes the purchaser. If he be a trustee, the rule is, without exception, that he cannot purchase during the existence of the

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trust, without the express assent of the *cestui que trust*. It was formerly doubted whether the doctrine applied to a public sale, as a public auction, for example; but it is now held, that in all cases where a purchase has been made by a trustee on his own account, of the estate of the *cestui que trust*, although sold at public auction, it is at the option of the *cestui que trust* to set aside the sale, whether *bonâ fide* made or not. *Campbell v. Walker*, (5 *Vez.* 678, 680; 13 *Vez.* 601); 6 *Vez.* 625; *Ex parte Bennett*, (10 *Vez.* 381, 385-6); 12 *Vez.* 335; 5 *Madd. R.* 91. The authorities which have been already cited, also prove that he has been held to account for the profits, even where the property has been sold at a judicial sale. 2 *Whart.* 63.

It remains now to inquire, whether it has also been held applicable to a judicial sale even where the purchaser had no control whatever over the sale. That rule arises from the confidential relation between the parties, and not from the bare circumstance that the purchaser is buyer and seller, or that he has power to control the sale. It would seem to me only necessary to look through the cases, to come to the conclusion that the latter is the only rational foundation of the rule, and that it applies to all sales, public or private, judicial or otherwise, whether conducted by the purchaser or under the direction of an officer of the law.

A solicitor of a bankrupt or insolvent estate is not permitted to purchase at the sale of a bankrupt or insolvent estate, and yet he has not, as solicitor, anything to do with conducting or ordering the sale: and this, though not strictly a judicial, is in the nature of a judicial sale. *Ex parte Lacey*, (6 *Vez.* 625); *Ex parte James*, (8 *Vez.* 337); *Davoue v. Fanning*, (2 *Johns. Ch. R.* 252); *Ex parte Bennett*, (10 *Vez.* 381). An attorney for a creditor of a junior judgment to one on which process is issued, cannot, in this State, at least, purchase and hold in opposition to his client, provided the sale does not cover his client's debt. A contrary idea will hardly be advanced. *Black's Administrators v. Black*, referred to in *Campbell v. The Pennsylvania Life Ins. Co.*, (2 *Whart.* 63). I cite these cases as bearing very directly on this point, and showing the rule is founded exclusively on the confidential relations of the parties. But without insisting on these cases, and *Riddle v. Murphy*, (7 *Serg. & Rawle* 230); 3 *P. W.* 251; 12 *Pet.* 24, I now come to the case of *Van Epps v. Van Epps*, (9 *Paige* 241). In that case the estate was sold under a master's sale, upon a prior mortgage, and the purchaser was a trustee for several subsequent mortgagees. But notwithstanding, the court decided that he was not authorized to purchase the property sold for his own exclusive benefit, to the prejudice of the subsequent mortgage, which he held in trust for others. Here, it must be remarked, it was a judicial and public sale; it was sold under a mortgage, over which the trustee and purchaser had no control; for, it will be observed, the first mortgage had been assigned to the New York Life Insurance and Trust Company,

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and, in consequence of the default of the mortgagee, the mortgage had been foreclosed, and was sold by them for payment of their debt. It is, therefore, a case in point. Now mark the ground upon which the chancellor founded his decree. "The rule of equity, which prohibits purchases by parties placed in a situation of trust or confidence with reference to the subject of purchase, is not, as the defendant supposes, confined to trustees or others who hold the legal title to the property to be sold; nor is it confined to a particular class of persons, such as guardians, trustees or solicitors. But it is a rule which applies universally to all who come within its principle; which principle is, that no party can be permitted to purchase an interest in property, and hold it for his own benefit, where he has a duty to perform in relation to such property which is inconsistent with the character of a purchaser on his own account and for his individual use."

And laying down this sound principle, the wisdom of which commends itself to every rational mind, the chancellor proceeds to state what is the duty of a trustee. He says; "here the duty of the trustee, as holder of the junior mortgage, was to make the mortgaged premises, if possible, produce upon the sale sufficient not only to pay off the prior encumbrance and the costs of foreclosure, but also to satisfy the subsequent encumbrance, which he held in his fiduciary character; and this duty came directly in conflict with his interest as a purchaser for his own benefit, to bid in the property at the lowest sum for which he could obtain it." The chancellor then states the result of the conflict, which, as might naturally be expected, results in the promotion of the interest of the trustee and the sacrifice of the interest of the *cestui que trust*. The chancellor further says; "In cases of this kind the court does not suffer itself to be drawn aside from the application of the equitable rule, by any attempt to establish the fairness of the purchase. In the language of the learned commentator on American law, the rule is founded on the danger of imposition and the presumption of the existence of fraud which is inaccessible to the eye of the court. The policy of the rule is to shut the door against temptation, which, in cases where the confidential relation exists, is of itself deemed to be sufficient to create the disqualification. 4 *Kent's Com.* 438." If there is any difference between that case and this, I must be struck with judicial blindness, for I am totally unable to see it. Both are judicial sales, and in neither had the trustee a control of the sale, and the results of both were disastrous to the interests of the beneficiary; for in this case, Fisk, the assignee purchases a property for less than \$5000, which has been made to yield, in his hands, upwards of \$50,000. A more practical commentary on the wisdom of the rule could not be conceived. There is a well-grounded belief that Fisk was guilty of actual fraud; that he in truth was buyer and seller; and yet the fraud is inaccessible to the eye of the court. There is no want of charity in

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supposing that his knowledge of the value of this property was derived from his confidential relations; and yet this, it seems, cannot be established to the satisfaction of the Court. Fraud is not to be presumed. That he has been exposed to the danger of temptation cannot be denied, and that he has not resisted the temptation I most firmly believe. It is, therefore, such a case as falls particularly within the rule, and about which the learned chancellor, who delivered the opinion of the court in *Van Epps v. Van Epps*, would not have had a particle of doubt, if that case be a faithful exponent of his views.

But the point has not only been ruled in New York, but by this court in *Bartholemew v. Leech* (7 Watts 472), where it is held, "that an agent having the charge of unseated lands cannot become a purchaser thereof at a sale for taxes, without a previous explicit renunciation of the trust." And here let it be remarked, that formerly lands were sold by the sheriff for taxes, but under the existing Acts by the treasurer; it is, therefore, a judicial sale, or in the nature of a judicial sale. And further, it cannot be pretended that the purchaser in *Bartholemew v. Leech* had any control whatever over the sale; besides, it was shown that the agency had expired before the sale. But what say the court through the Chief Justice: "It is not denied that the defendant's father had been the plaintiff's agent and curator of the land. The father himself testified that his agency had expired before the sale; but that is not enough. To capacitate him as a purchaser on his own account, he must have explicitly resigned his trust. The most open, ingenuous and disinterested dealing is required of a confidential agent, while he consents to act as such; and there must be an unambiguous relinquishment of his agency before he can acquire a personal interest in the subject of it. To leave a doubt of his position in this respect, is to turn himself into a trustee. It is unnecessary to recur to authority for a principle so familiar, or so accordant with common honesty. The agent was employed in this instance expressly to preserve the land from being sold; and taking his agency to have been left unclosed by the absence of an explicit renunciation of it, neither *Leisenring v. Black* (5 Watts 303), nor *Riddle v. Murphy* (7 Serg. & Rawle 230), presented a stronger case to restrain the agent from purchasing for himself. Within the three preceding years, he had been reimbursed his expenses and paid for his services; but that was not a dissolution of the previous relation."

So the Court thought and ruled in 1838, and I am sorry they have seen cause to change their opinion in 1843. It never occurred to any person that its being a judicial sale, conducted by a public officer, and not controlled in any way, could alter the established rule of law. It is put upon the broad principles of common honesty, which forbid a man to purchase, who stands in the confidential relation of trustee, until he has explicitly resigned his trust with

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the knowledge of the *cestui que trust*. It did not then enter into the mind of any person; that because the sale was a judicial sale, and the treasurer the seller, therefore the relation of trustee and *cestui que trust*, *ipso facto* ceased, and that consequently he was at liberty to purchase for himself. This case can only be supported on the broad and sound principle that the trustee cannot purchase for himself, while the confidential relation exists. If the Court was right then, of which I entertain no doubt, they are wrong now. In my judgment, the two cases cannot be reconciled.

But there is still another case, *The York Buildings Company v. M'Kenzie*, (8 *Brown's P. C.*). This case is cited and recognised as an authority in *Davoue v. Fanning*, (2 *John. Ch. R.* 269), from which I extract the following statement of the case: "The appellants were an insolvent company, and their estates were sold by order of the Court of Sessions, at a *public judicial sale*, to satisfy creditors. The course at such sales is to set up the property at a value fixed upon by the court, which is called the upset price, and which is founded on information procured by the common agent of the court, who has the management of all the out-door business of a cause. The respondent here was the common agent in that case, and he purchased for himself at the upset price, no person appearing to bid more, and the sale was confirmed by the court; and in the course of eleven years' possession he had expended large sums for buildings and improvements. There was no question as to the fairness and integrity of the purchase. But the object of the appellant was to set aside the sale and have the estates sold anew, on the ground that the respondent being the common agent in court in behalf of all parties to procure information and attend the sale, was in the nature of a trustee, and so disabled to purchase. The appellants contended that the common agent was under a disability to purchase arising from his office; that the rule was founded in reason and nature, and prevailed wherever any well-regulated administration of justice was known; that the disability rested on the principle which dictated that a person cannot be both judge and party, and serve two masters; that he who is intrusted with the interest of others, cannot be allowed to make the business an object to himself, because, from the frailty of human nature, one who has power will be too readily seized with an inclination to serve his own interest at the expense of those for whom he is intrusted; that the danger of temptation does, out of the mere necessity of the case, work a disqualification—nothing less than incapacity being able to shut the door against temptation, when the danger is imminent and the security against discovery great; that the wise policy of the law had therefore put the sting of disability into the temptation, as a defensive weapon against the strength of the danger which lies in the situation; that the parts which the buyer and seller have to act, stand in direct opposition to each other in point of interest; and this conflict of

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interest is the rock, for shunning which the disability has obtained its force, by making that person who has the one part intrusted to him, incapable of acting on the other side."

"The counsel of the respondent admitted the general principle, and contented themselves with denying its application, holding that the common agent was not to be considered in that case, and in respect to that sale, in the character of either seller or trustee. But the House of Lords thought otherwise, and set aside the sale, ordering the purchaser to account for the rents and occupation in the meantime, with a liberal allowance to him for his permanent improvements." This was a judicial sale beyond doubt, and the counsel puts the case on two grounds; that the common agent was a buyer and seller, and, secondly, on the more general ground that he stood in the relation of a trustee. It must be remarked that the respondent admits that if he was either, the sale must be set aside. It never occurred to him to urge that as it was a judicial sale, the purchaser, though trustee, unless he was both buyer and seller, had a right to hold the property discharged from the trust. This discovery was reserved for more modern times.

On these grounds, I feel myself with the utmost reluctance compelled to dissent from the judgment of the Court, or rather from the reasons assigned for the judgment. It may, perhaps, not be improper to state, that as there were other reasons for the judgment, I must still with great respect consider this point as an open question.

The correctness of this opinion, it will be observed, depends upon very simple, and, as I believe, well-established principles. First, a trustee is prohibited from purchasing the trust estate during the existence of the trust; and second, that the trusts subsist, at least for certain essential purposes, notwithstanding the property is in the hands of a judicial officer. This it has been my aim to prove on principle and authority; and if these principles are assumed, it follows as a necessary and inevitable consequence that a trustee, who becomes a purchaser even at a judicial sale, takes the estate clothed with the same trusts as before the sale, and is accountable as such for the profits.

Judgment reversed, and judgment for the defendants.

Myers *against* Entriken.

A factor who sells the goods of his principal, consigned to him for that purpose, and takes the notes of the vendee, which he has discounted for his own accommodation, thereby becomes responsible for the amount of the sales in the event of the insolvency of the purchaser.

ERROR to the District Court of *Allegheny* county.

James Entriken, Jun. against Myers & Richey. Case in *assumpsit*. The defendants received a quantity of blooms from the plaintiff to sell on commission. On the 27th of December 1841 they sold the blooms to Messrs King, Higby & Anderson, and on the same day informed the plaintiff, by letter, as follows: "We have sold your blooms to King, Higby & Anderson, at four, six and eight months' time, for \$60 per ton, which was the best that could be done in our market," &c. The defendants endorsed these notes and discounted them in bank for their own use, having a private arrangement with the purchasers that the notes should continue to be renewed from time to time, as they became due, for one, two, or three renewals of sixty days, *if* the banks were willing to renew them.

As the notes severally fell due, they were accordingly renewed by new notes, drawn by the purchasers and endorsed by the defendants, deducting certain amounts paid on them at the time of renewal, sufficient to pay charges and expenses to defendants and some \$200 or \$300 over. After this, on the 10th of September 1842, King, Higby & Anderson stopped payment and became bankrupt; but some time after withdrew their bankrupt proceeding and compromised with their creditors. The defendants informed the plaintiff of the bankruptcy of King, Higby & Anderson, by letter dated 12th September 1842.

There was also some evidence that it was not unusual for consignors or factors, in Pittsburgh, to make such arrangements with their vendees, and to discount the notes for their own use in the banks, continuing to renew them from time to time, so long as the banks will permit. And upon this state of facts, the question in this case was, whether the defendants were liable for the whole amount of the goods sold, or only for the amount received?

GRIER (President) instructed the jury that the defendants were liable for the whole amount of the goods sold. Verdict and judgment accordingly.

Lowry, for plaintiff in error, cited 7 *Mass.* 37; 6 *Whart.* 1;

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21 *Wend.* 613; 20 *Pick.* 167; 6 *Cowen* 186; 15 *Pick.* 179; 1 *Rawle* 129; 9 *Conn.* 418.

Kline, for defendant in error, cited 1 *Eng. Com. L.* 250.

The opinion of the Court was delivered by

GIBSON, C. J. — The usage of factors, said to prevail in Pittsburgh, to sell on account of their principal, take notes in their own names with an agreement to renew, and discount them for their own accommodation as long as the bank is willing, is a gross imposition, which can never be sanctioned by a court of justice. In this instance the defendants, who are commission merchants, sold at four, six and eight months; took the purchasers' notes in their own name, and discounted them in bank for their own use. Pursuant to a secret agreement with the purchasers, they were renewed, as they fell due, by other notes drawn and endorsed in the same way, till the period of the purchasers' bankruptcy, which occurred eight months and a few days after the sale. There cannot be a doubt that the plaintiff below was entitled to the produce of the discounted notes; but the defendants, in place of remitting it to him, employed it in their own business, and now insist that the accommodation was at the plaintiff's risk! It is said the sale was made for a better price than could have been had at a short credit, and that no sale of the article could have been effected on any other terms. Be it so. But why was not the produce of the notes remitted, and why was not the plaintiff suffered to have the use of his own money? The temptation to abuse, afforded by the usage, is too strong to be tolerated. The greater the number of renewals, the better for the factor, who would have not only his commission, but the use of the money in the mean time; and all at the risk of the principal! Surely, that cannot be the law. Nothing is more familiar than that the principal is to have all the increase made on his property; and it was held in *Rogers v. Boehm*, (2 *Esp. Ca.* 704), that an agent is liable for interest, where any has been made, on a balance in his hands. Such is the general rule, though in England there are exceptions to it, where, for instance, the principal was informed of the state of the case, but desired the agent to keep a large balance in hand, as in *Chedworth v. Edwards*, (8 *Vez.* 48), or where the accumulation was known to the principal for a great length of time, as in *Beaumont v. Boulton*, (11 *Vez.* 360). Such, however, would scarce be held the rule of interest in Pennsylvania. In *Diplock v. Blackburn*, (3 *Camp.* 43), Lord ELLENBOROUGH said, that a usage authorizing an agent to make a profit by a bill on his principal, is a "usage of fraud and plunder," and not to be tolerated. We are not here, however, on a question of interest or profit made, but on a question whether the defendants did not make the notes their own, by using them as their own. The point seems almost to have been determined

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in *Lefevre v. Lloyd*, (5 *Taunt.* 749; S. C., 1 *Marsh.* 318), where a broker who had sold the goods for a bill at a given day, was held liable to his principal on a bill which he himself had drawn on the purchaser. So in *Simpson v. Swan*, (3 *Camp.* 291), a factor who had taken a security for the price of goods sold in his own name, and who had given his own security to the principal for the proceeds, was held liable on it after the failure of the purchaser. These cases go on the principle that he had treated the original debt expressly as his own; and they do not entirely come up to the point before us. But in *Goodenow v. Tyler*, (7 *Mass.* 36), after holding on very sufficient ground that a factor who sells on a credit and takes notes in his own name, does not by that alone become liable to the principal in the event of the purchaser's failure, Chief Justice PARSONS said, that it would be otherwise were he to negotiate them for his own use. Is not that the very case? The same thing, in effect, was asserted in *Wren v. Kirton*, (11 *Vez.* 382), where it was said that an agent who places his principal's money to his own account with his general banker, takes the risk of the banker's failure; for that he cannot so deal with it as to be able to treat it as the money of his principal, or as his own, according to the event. Neither could these defendants treat the money in contest as their own, when it suited their convenience to use it, and as the money of the plaintiff, when it suited their convenience to cast the loss of it on him. By discounting the notes for their accommodation, they made them their own, and became personally liable for the amount of sales.

Judgment affirmed.

Barnet *against* School Directors.

Under the Act of 16th April 1840, a rated inhabitant of a township is a competent witness in a suit to which the school directors of the township are a party.

Such directors may maintain *assumpsit* for money had and received against a delinquent collector of the school tax.

Where the declaration set forth their individual names, it was held they might be struck out as surplusage.

In such suit, where the appointment of the defendant as collector is lost, it is competent for the plaintiffs to prove that he represented himself as collector, received the school-tax as such, and was, in fact, collector of the township for a certain year.

Where a party notifies a justice of the peace that a deposition is to be taken before him on behalf of the opposite party, and the justice, at his request and in his absence, puts certain questions to the witness, he shall not allege want of notice.

ERROR to the Common Pleas of *Jefferson* county, in which an action of *assumpsit* was brought by Thomas M'Kee and others,

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school directors of Young township, against David Barnet, to recover the amount of certain taxes received by him as collector of the school-tax for said township.

The plaintiffs called a witness, who stated that he resided in Young township, and paid taxes. The defendant objected to his competency, but the objection was overruled, and the defendant excepted.

The plaintiffs moved to amend the *præcipe* and writ by striking out the names of Thomas M'Kee *et al.*, so that the suit would be, "The School Directors of Young Township v. Barnet," and to make the declaration correspond thereto. The defendant objected to this amendment, but the court overruled his objection and directed the names to be stricken out as surplusage; to which the defendant excepted.

The plaintiffs, after proving by the secretaries of the board of directors for 1839 and 1840 that they found no minutes among the papers in the office of any appointment of collectors, offered to prove that the defendant acted as collector of school-tax for Young township; represented himself as such; received school-tax for said township, and was, in fact, the collector for said township for the year 1840. The defendant objected, but the court overruled the objection and sealed an exception.

The plaintiffs then gave evidence that the defendant acted as collector of the township for the year 1840, and so represented himself; that he had a warrant and duplicate, in which the amount of seated tax charged was \$316, and of unseated tax, \$180. That notice was served on him by the directors to produce his duplicate. That the Board sent for him to come and settle and get exonerations; and on being asked by the president what he had done with the money, he said, he collected it, and intended to keep it, and have a school in their own district. He refused to pay it over till the Board showed their authority.

The plaintiffs offered in evidence a deposition taken before a justice of the peace; to which the defendant objected on the ground that no notice had been given of the time of taking it. The justice then testified that the defendant told him the deposition was to be taken at his (the justice's) house, on a certain evening, and that he could not attend, but requested the justice to put certain questions to the witness. The deposition was taken at the time appointed, and the justice put the questions to the witness. The defendant still objected to the deposition being read; but the court admitted it to be read, and the defendant excepted.

The defendant proved that he had paid the school-treasurer, at different times, for the year 1840 until 1841 or 1842, on account of seated tax, in all, \$71.47.

The defendant requested the court to instruct the jury, that inasmuch as the 8th section of the Act of 1838 afforded a full, complete and adequate remedy against the collector of school-tax,

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that remedy was exclusive, and an action of *assumpsit* for money had and received could not be sustained.

The court refused to give this instruction, but instructed them that the action of *assumpsit* for money had and received could be sustained. That the plaintiffs were entitled to a verdict for whatever amount the jury believed, from the evidence, the defendant received, deducting the amount paid by him to the treasurer. That there was no evidence, however, that the defendant received any part of the unseated tax, and he could not be charged with it.

The defendant excepted to the charge, and assigned for error the decisions of the court in the bills of exception, and their instruction that *assumpsit* could be sustained.

Buffington, for plaintiff in error, referred to the Act of 16th April 1840, *Purd.* (1841) 404; Act of 13th June 1836, sect. 6, *Purd.* (1841) 316; Act of 12th April 1838, sect. 6, *Purd.* (1841) 321.

Jenks, contra, cited 2 *Black. Com.* 128; 3 *Reed's Black.* 39; 2 *Dall.* 138; 6 *Serg. & Rawle* 289.

The opinion of the Court was delivered by

ROGERS, J.—A rated inhabitant of a city, county, &c., at common law, is not a competent witness in a suit in which the city or county is a party. But as the interest, which is the ground of exclusion, is, in most instances, very trifling, various statutes in England, and in this country, have been passed, admitting them to testify; making the objection to their credit, rather than their competency. Thus, by the Act of 16th April 1840, sect. 6, it is enacted, "that no person shall be excluded from being a witness or juror in any suit, prosecution or proceeding, in which any county, city, incorporated district, borough or township is a party or is interested, by reason of such person being or having been an officer, rated citizen or inhabitant in such county, city, district, borough or township, or owning assessed or taxable property, or being liable to the assessment or payment of any tax therein." The school directors, it is true, do not come within the words of the Act, but they are substantially included. Every township in the State is, by law, a school district; and, with very few exceptions, the jurisdiction of the school directors is commensurate with the limits of the township. They are not a corporate district, but they are a *quasi* corporation; and, as such, may sue and be sued. The inhabitants of the township, and those holding property in it, are the parties in interest; and the reason of the admission of rated inhabitants applies as well here as in other cases.

The court was right in allowing the amendment. The names of the directors were improperly inserted in the writ, for the school directors sue in their public character, and not in their individual

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right. Courts, of late, in this State, have been liberal in allowing amendments, particularly where it is plain an adherence to form will do injustice, and prevent a trial on the merits; and in this we have been carrying out the intention of the Legislature, manifested by several statutes.

We see no error in the third bill. It appears that the record of the appointment was lost; it was, therefore, competent in an action on the common counts, to prove that the defendant represented himself as collector, received the school-tax as such, and was, in fact, collector of the township for the year 1840.

There is nothing in the objection to the deposition. For, although the defendant may not have had notice of taking it, yet he attended and cross-examined the witness; or, what is the same thing, the justice, who acted as commissioner, was constituted his agent, and cross-examined the witness for him, according to his instructions. After this, he shall not be permitted to allege ignorance of the time and place of taking the deposition.

It is, however, insisted that the action of *assumpsit* will not lie because the plaintiff has a statutory remedy. By the Act of the 13th June 1836, sect. 6, the president of the board of directors may issue the warrant to the township or borough collector, or to some other suitable person residing within the district, and shall require from him sufficient security to insure the faithful discharge of his duty. But by the 6th section of the Act of the 12th April 1838, it is provided, that the directors shall have power to appoint collectors of the common-school-tax, without requiring bond. And in the 8th section of the same Act, a mode is pointed out to secure the tax, and a remedy is given against delinquent collectors. The latter Act, however, does not repeal the former. The directors may pursue either, as they may deem expedient; that is, by the appointment of a suitable person, requiring sufficient security by bond, or, when the appointee has real estate, by pursuing the directions of the Act of 1838. If, therefore, this is to be viewed as an appointment to office under the first Act, and there is nothing to prevent us so considering it, there is no statutory remedy whatever, and, of course, there can be nothing in the objection to the common law action of *assumpsit*, which is the appropriate remedy to recover monies actually received and in the hands of the delinquent collector. It must be remarked, that this case presents a lamentable instance of the utter disregard of public officers to the plain directions of Acts of Assembly. They have obeyed neither Act. They have failed to take a bond under the Act of 1836; nor have they entered the claim under the Act of 1838. If, therefore, the plaintiff cannot maintain this suit, the township would be without remedy, and the defendant would be permitted, contrary to every principle of justice, to retain money which he received in his character of collector.

Judgment affirmed.

Bell *against* Murphy.

Upon a plea of *nul tiel record* to a *scire facias* upon a recognizance of bail, on appeal from the judgment of a Justice of the Peace, the issue must be tried by inspection of the transcript and recognizance filed, and not of the docket of the Justice.

ERROR to the Common Pleas of *Somerset* county.

John Bell against Samuel Murphy, bail of Henry Defebaugh. This was a *scire facias* upon a recognizance. John Bell obtained a judgment before a Justice against Henry Defebaugh, from which he appealed. The cause was tried in court, and a verdict and judgment rendered for the plaintiff. To the *scire facias* upon the recognizance the defendant pleaded *nul tiel record*. The plaintiff gave in evidence the transcript of the Justice filed with the appeal, exhibiting a recognizance of the defendant, Samuel Murphy, in due form. The defendant then produced the docket of the Justice, and gave the proceedings in the original suit and appeal in evidence, by which it appeared that he had not been bound in a recognizance as bail of Henry Defebaugh. Whereupon the Court rendered a judgment for the defendant.

Hampton, for plaintiff in error.

Coxe, contra.

PER CURIAM.—The issue was on the existence of a record in the Common Pleas to support the *scire facias*; and it is not easy to see what the Justice's docket, which is no record at all, had to do with it. What was the record of the recognizance in the Common Pleas? The certified transcript from the Justice, which had become matter of record by the filing of it, and of such absolute verity that nothing could be averred against it. Yet it was allowed to be disproved and put down by the Justice's docket, resting on parol proof, which was declared to be the original record. The Justice's docket a record of the Common Pleas! It is the transcript which becomes the original record by the return, for the truth of which the Justice is answerable. The transcript, in this instance, contains not only the essentials, but the form of a perfect recognizance; and what is the difference between it and the docket? No more than that the former is drawn up at length, and that the latter contains the memorandum taken at the time of the transaction, to serve for making out the recognizance subsequently. The Justice, had he chosen to rely on his memory, might have dispensed with even the memorandum; for the contract is

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made by the assent of the recognitors to the words propounded orally, of which the writing is but evidence. The officer then makes up the written evidence of it at his leisure, and returns it to the proper court, where it acquires the properties of a record. There was such a record in this instance, and the production of it sustained the issue on the part of the plaintiff.

Judgment reversed, and judgment on the plea of *nul tiel record* rendered for the plaintiff, with a *procedendo* awarded as to the other pleas.

Moore against Pearson.

The testimony of a deceased witness, which has been taken on the trial of another action between the same parties or those under whom they claim, about the same subject matter, may, if proved by the notes taken of it at the trial, be given in evidence to establish the facts then testified to.

Upon an objection to evidence, the Court will not stop to hear the testimony of the objecting party as a ground to sustain their objection.

In an action of ejectment, it is competent for the plaintiff to give evidence of the declarations of one who was a joint claimant of the land in dispute with the ancestor or alienor of the defendant respecting the boundary of it, that being a point material to the issue. And upon such evidence being given, it is not competent for the defendant to prove the declarations of the same person made at a subsequent period, and after suit brought, having a different tendency.

ERROR to the District Court of *Mercer* county.

John Pearson against James Moore, Hugh Moore, and Aaron W. Mumford. Ejectment for 200 acres of land. The plaintiff offered in evidence the deposition of Judge Banks to prove the testimony of Allen Dunn, Esq. deceased, a witness in an ejectment wherein Hugh Moore and Samuel Evans were plaintiffs, and John Pearson defendant, and the *scire facias* and affidavit substituting Hugh Moore and James Moore as heirs of Hugh Moore deceased, and Aaron W. Mumford as purchaser from Samuel Evans, as defendants in this suit. This was objected to on the ground that it was not in this suit or between these parties, and that he did not prove enough to enable him to give evidence—not proving that he recollected the testimony independent of his notes.

THOMPSON, President.—It appears that the testimony was taken in a suit where the parties were reversed, with this difference—it is the heirs and assignees of the original plaintiffs that are now defendants. It is the same subject-matter now as then; and we overrule both objections, and at the defendants' request seal an exception.

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After the Court had decided on the above exception, the defendants offered in evidence a deed from John Sheakly and wife to the defendants, to show that the defendants did not hold under Hugh Moore and Evans; and further objected on this ground to the deposition being read.

By THE COURT.—No title has been shown in John Sheakly, nor is it competent, after showing by the record what has been shown in this case, to stop the plaintiff in this way. Objection overruled, and exception.

The plaintiff having called Samuel Evans, offered to ask him what James Herrington said in presence of Hugh Moore and Samuel Evans, on an examination of the lines, and while Herrington was claiming an equal share in what was supposed to be vacant, as contained in what the plaintiff claimed to be 1028, 1029, 1030, and which Herrington, Moore and Evans claimed together as vacant land. This was objected to, the objection overruled, and exception taken.

The defendants proposed to prove what Herrington said at another time, and after a suit had been brought for the land, on the subject of the disputed boundary. The plaintiff objected, and the Court overruled the evidence.

The other matters in the cause, which were voluminous, and involved no general principle, are not stated further than they are contained in the opinion of the Court.

Foster and Stevenson, for plaintiffs in error. The deposition of Judge Banks was improperly admitted. 5 *Whart.* 132; 4 *Serg. & Rawle* 203; 4 *Binn.* 111; 1 *Dall.* 2.

If Herrington's declarations were evidence at all, they were evidence for us, and Townsend should have been admitted. But the cases show that the declarations of a deceased person are confined to boundary, and are not extended so as to admit evidence of title. Proving a donation corner proves the title. 5 *Rawle* 348. In support of the objections to Martin's detail of Herrington's conversations, see 2 *Yeates* 477; 6 *Binn.* 62; 2 *Serg. & Rawle* 70; 7 *Watts* 42.

The 5th error assigned is supported by *Smith v. Moore* (5 *Rawle* 348), and the same principle applies to the 7th and 8th errors. That case decides explicitly that the identity of each tract depends upon its numbered corner, and upon this fact we wished to go to the jury. If there were two 1029's in the district, the general draft must be called in to decide, as evidence of the intent of the surveyor; and the Court erred in telling the jury that if they found one 1029 original, the other was fabricated. This was a fact for the jury alone.

We were entitled to a clear and distinct reply to our 2d point; or "The plaintiff must satisfy you of the truth of his case" being

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always correct, will be an answer to any and every point propounded by counsel.

The fact left to the jury in the answer to the plaintiffs' 2d point was one unsupported by a tittle of evidence, no one witness having sworn to having ever counted the maple. 8 *Watts* 385; 6 *Watts* 487.

The plaintiff made his declarations evidence by first giving them to the jury. 2 *Stark. R.* 314; 4 *Rawle* 400; *Greenleaf's Ev.* 493; *Floyd v. Bovard* (post, 75).

Pearson, for defendant in error, as to the admission of the evidence, cited 10 *Serg. & Rawle* 14; 17 *Serg. & Rawle* 409; 6 *Watts* 487; 6 *Binn.* 59; 2 *Serg. & Rawle* 70; *Stark. Ev.* 24; 11 *East* 589; 17 *Johns.* 335; 18 *Johns.* 330; 16 *Serg. & Rawle* 193; 6 *Whart.* 175.

The opinion of the Court was delivered by

KENNEDY, J.—The first error is an exception to the decision of the court, admitting the deposition of Judge Banks. The plaintiffs in error were the defendants in the court below; but in a former ejectment brought for the same land and tried, their ancestors and assignors, from whom they derived their claim to it, were plaintiffs, and the present defendant in error, who was plaintiff below in this case, was the defendant. On that trial he adduced Allen Dunn, who testified as a witness on his behalf and has since died. Judge Banks was counsel then for Pearson, the defendant in error, and took notes of the evidence given by Dunn. The deposition of Judge Banks was offered to prove what Dunn testified to on behalf of Pearson. The deposition was objected to, because it was not taken in the present action, or in any other between the same parties for the same subject-matter; and likewise because Judge Banks was not able to testify that he had any recollection of what Dunn testified to, but believed that the notes taken by him of the testimony of Dunn, contained substantially all he did testify to, though perhaps not in the very words used by Allen throughout, but in words of the same import. The court, however, admitted the deposition to be read in evidence, and we think rightly, too; for it is very evident, if the testimony of a deceased witness, given by him in his lifetime on a former trial of the same matter between the same parties, is only to be supplied by some one who recollects every word of his testimony, it will seldom if ever be practicable to do so. Indeed, such is the frailty of human memory, that the correctness of the statement of one who undertakes, after a lapse of some considerable time, to give the very words which the witness used in giving his testimony, may well be doubted. All experience, in this respect, fully proves that it is more safe to rely on the notes taken at the time of what the witness said, by one who, upon his oath or affirmation, states

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that he believes they contain substantially all the witness testified to.

But before reading the deposition in evidence, after the court had decided that it was admissible, the defendants, for the purpose of preventing its being read, offered to read in evidence a deed of conveyance from John Sheakly and wife for the land in dispute to the defendants, which the court very properly overruled. This deed was offered to show that the defendants did not claim under the plaintiffs in that suit as their heirs or assignees, but from Sheakly, who did not, from anything that was offered to be shown, appear to have the least colour or shadow of claim. But even supposing that Sheakly had had a claim, it would have been highly improper in the court to have received the deed in evidence then, for the purpose of preventing the plaintiff from giving the testimony of Dunn in evidence, after he had given evidence showing that the parties to this action were, in contemplation of law, the same as those in which Dunn had testified. For the court to have received the evidence offered by the defendants, would not have availed them, unless the court had also gone further, and decided that they did not claim the land in dispute as the heirs or assignees of those who were the plaintiffs in the former action. But this would have been deciding a question of fact, which, in case of conflicting testimony, belonged to the jury to settle, and not to the court. If the defendants, therefore, could have shown that they did not claim as the heirs and assignees of the plaintiffs in the former action, but under Sheakly, who had a distinct and different title or claim, they ought to have waited until the plaintiff had closed his evidence, and then have offered and given theirs, so that the question of fact should have been left by the court to the jury to settle, under a direction from the court to the jury, if they believed the defendants claimed under Sheakly exclusively, that they ought to throw the testimony of Dunn out of their view altogether.

The third error is also an exception to the opinion of the court, receiving the declarations of James Herrington in evidence, made by him in the presence of Hugh Moore, the ancestor of two of the defendants below, and Samuel Evans, the grantor of the other defendant, when examining the lines, and while Herrington was claiming an equal share in what was supposed then to be vacant land, and, as plaintiff alleges and will show, embraces the tracts Nos 1028, 1029 and 1030, all which were claimed by Herrington, Moore and Evans jointly, as vacant land. The declarations were, that before the Bowman trial, which took place in 1807, Herrington, in a conversation with Samuel Evans the elder, Samuel Evans the younger, Hugh Moore and one Stewart, said, "We have 1028 on the district line, 1029 on the bank of French Creek, and 1031 south of Deer Creek, and we are safe." Now, as Herrington claimed the land in dispute, at the time of making his declarations,

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in conjunction with Moore and Evans, from whom the plaintiff below had given evidence showing that the defendants there had obtained their claim and possession of the same, it can scarcely be doubted that they were evidence for the plaintiff below, so far as they make in his favour. Being made, too, in the presence of Moore and Evans, from whom it was shown that the defendants below derived their claim, they may, as would seem to have been the case, have been assented to all round, or at least not contradicted, and therefore be regarded as the declarations of Moore and Evans; and if so, it is impossible to question their admissibility as evidence against the defendants. The declarations of Herrington, testified to by John Martin, seem also to come under the same view, and, therefore, were properly admitted by the court.

The fourth error is an exception to the opinion of the court, rejecting an offer by the defendants below to prove by Abel Townsend, that after the commencement of this action, and during its pendency, James Herrington told him he had seen the tree with a 1029 on it one day, and when he saw it the next day it had a different number; and that Townsend accused him of having altered it, and he did not deny it. This was offered, as it was alleged, to discredit the previous declarations of Herrington given in evidence by the plaintiff. If Herrington had been living, and had given evidence on the trial as a witness for the plaintiff, doubtless the defendants would have been entitled to give evidence of his declarations, made at any time, tending to contradict what he had testified to. But then he was not sued by the plaintiff as a witness; nor can his declarations, which the plaintiff gave evidence of, be viewed in that light, for the purpose of doing away the effect of his declarations given in evidence by the plaintiff. A party interested having made declarations which may be given in evidence against him, or those claiming a community of interest with him, cannot be allowed to avail himself of his subsequent declarations contradicting the first, or having a contrary tendency, by giving the latter in evidence, especially when made, as in this case, *post litem motam*; for it is perfectly plain, if he were allowed to do so, the rule which permits his first declarations to be given in evidence would be wholly futile and useless. Neither would the rule avail anything, which allows his first declarations to be given in evidence against those claiming a community of interest, or their privies, if his subsequent declarations of a contrary tendency were allowed to be given in evidence, with a view to repel the effect of the first; because it is easy to perceive that such subsequent declarations could generally be obtained by the latter persons to be made, and would seldom if ever be wanting for their benefit. We therefore think the court decided correctly in rejecting the offer.

The fifth error is an exception to that portion of the charge of the court to the jury, in which it states that they may supply a

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missing number by reference to the tracts north and south of it. What the court said on this subject is in these words: "It often happens now that the numbered corners are gone; how will you establish the fact that it stood at a particular point? I would say it may be done in this way. The surveyor-general, in making these surveys, gave instructions to his deputies to number all the lots in a particular class, so that they should follow each other in numerical order. Now, if the original number in the centre of a range is absent, and the numbered corner north as well as south be found on the ground, and original lines leading to the alleged place of the absent corner, a jury would in all probability be satisfied with this as fixing the location of the absent number." It is difficult, if not wholly impossible, to discover any well-founded objection to what the court said on this point. As it was made the duty of the deputy-surveyors to designate the corners by numbers in numerical order, the presumption is that they did so, until the contrary shall be made to appear; hence I take it that it would be the bounden duty of the jury, in the absence of testimony tending to prove the contrary, to find that the intermediate tract, without number, had the intermediate number originally affixed to it, which corresponded with the intermediate number between the two numbers on the adjacent north and south tracts respectively. There is clearly, therefore, no error in what the court said on this point.

The sixth error is an exception to what the court said to the jury in relation to the two trees, each of which was alleged to have been marked 1029, where only one of them could have been properly so marked originally. In regard to this the court said, "The presumption, in the first place, is, there are not two numbers 1029. It will require very clear proof as to both to establish them both as original; if either is doubtful, the proving that one is original would in all probability prove the other is not original." We can perceive no error in this suggestion of the court to the jury, which was not made with a view to have any binding instruction. It in effect was no more than, if they should find one of them to be clearly an original, the probability would be that the other was not, unless they had evidence also sufficient to show that it was an original number 1029. In this we think there is nothing exceptionable.

The seventh error is an exception to the instruction given by the court to the jury, that if they believed both 1029s to be original, the plaintiff ought to recover; and likewise to the answer given by the court to the first point submitted by the plaintiff below. The point was, "If the jury believe 1028 was originally made on the district line, 1029 next south on a maple at creek, and 1030 on a tree next south in Moore's field, the plaintiff has a right to locate his patent at the tract between 1028 and 1030, even if the number found on the ground at the next tract south is an

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original donation number, representing 1029." To this the court assented. It must be observed, however, that the defendants below showed no title to the land in dispute, if it be, as the jury found it was, number 1029; nor to any other tract of that number. Then as between the plaintiff and the defendants below, supposing there were two numbers 1029, the plaintiff had a right to elect as to which of the two he would apply his patent, and to say that he meant to hold the land in controversy under it. Had the defendants, being in the possession of the land, held a patent calling also for number 1029, the maxim, *in equali jure potior est conditio defendentis*, might have protected them; but without this or any other right to it, they have no pretence for resisting the plaintiff's right, if it be either of the tracts numbered 1029. The court below was therefore right in instructing the jury as it did in regard to this point.

The eighth error consists of an exception to the answer of the court to the plaintiff's second point. By this point, the court was requested to instruct the jury, "if they believed number 1031, as found on the ground and proven, is original, and marked as a number, that 1030 is the next tract north, 1029 next north of that, and 1028 next north of that, and the general draft shows them standing in numerical succession, they should be as located on the ground; and, therefore, if the jury believes 1031 original, and the newly discovered corner also original, 1031 must hold the land according to the rule of numerical succession, especially as there was another location for 1029." To which the court answered affirmatively, "if both numbers are original, viz., 1031, 1029 on the same tract, then the numerical succession will hold the tract on which the two numbers are put." To this answer we can see no possible ground of exception; because the numerical order, with the circumstance of number 1029 being on another tract, showed very clearly that the number 1029 had been placed on the tract numbered 1031 through mistake.

The ninth error is an exception to the answers given by the court to the defendants' second and fourth points. By their second point, the court was requested to instruct the jury, "if they have any doubts as to the originality and genuineness of the marks on the maple on French Creek, their verdict must be for the defendants." To this the court replied, it was necessary that they should be satisfied of the truth of the plaintiff's case, as claimed by him, otherwise they ought to find for the defendants. This answer would seem not only to be correct, but likewise sufficiently explicit to be understood by the jury; for the plaintiff's right to recover depended entirely, as must have been perfectly understood by the jury, upon the maple tree at the creek being an original corner, and marked as such number 1029. By the fourth point of the defendants, the court was requested to instruct the jury, that "if they believed the corner recently found to be original, that it

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accords with the general draft, as to position, and with vacant land on the east, and 1039 on the west, be the corner at the maple original or not, the plaintiff cannot recover." To which the court answered, that it could not concur, for the point alleged that the location of the tract would be controlled by boundaries east and west, vacant land east, and 1039 west; but if both were original, and the tract at the district line was 1028, and the third tract south was 1030, and 1029 was original, the plaintiff could recover. In this answer we can perceive no error.

Judgment affirmed.

Noble *against* M'Clintock.

Upon the second trial of a cause, in which a former judgment has been reversed, the counsel of either party has a legal right to read the opinion of the Supreme Court to the jury.

If a witness be out of the State, notes of his testimony proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appear that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence.

A party is entitled to an explicit answer by the court, in their charge to the jury, to every point of law submitted by his counsel: and it is error to omit to answer.

ERROR to the District Court of *Allegheny* county.

This was an action of *assumpsit* for goods sold and delivered, brought by Washington M'Clintock & Co. against Lewis Noble & Co. For a former report of this case, see 2 *Watts & Serg.* 152. On this trial the defendant's counsel offered to read to the jury the opinion of the Supreme Court in this case. This was objected to, and overruled by the Judge, who assigned the following reasons:

"On a late ineffectual attempt to try this cause, a use, or rather abuse, was made of that case which I cannot permit to be repeated. The opinion of the Supreme Court delivered on the case before them is not at all relevant to this case now before us; no point of law raised in this case was passed upon by that Court. On the first trial of the cause before me, Judge Shaler, then counsel for defendants, made two points of law, both of which I ruled against him, to which ruling he excepted; and I drew up my opinion afterwards in a few words, so as fairly to state the points of law ruled, without pretending to set forth my usual directions to the jury to judge of the facts for themselves. But when the cause came to be argued in the Supreme Court, new counsel employed excepted to the opinion because it did not submit the facts to the

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jury, and the cause was reversed for that objection; (one not true in fact, but which the brief and careless abridgement of my charge left it entirely open to;) and in the reasons given for reversal some opinions on the facts are given by Judge ROGERS, but which, on the issues trying in this court, are wholly irrelevant. On the late trial these remarks were read and commented on to the jury, and they were led to believe that the Supreme Court had decided all the law and facts of the case, and a portion of the jury were induced to disregard everything said to them by this court; and as the jury could not agree as to which court they were bound to obey, our time was lost, no verdict being rendered."

The defendant excepted to this opinion, and the court sealed a bill of exception.

The plaintiffs offered to read the notes of the testimony of David Noble, taken on the first trial of the cause, after proving that the witness then lived at St Louis. The defendant objected on the ground that his deposition might have been taken on a commission; and also because the witness had not been fully examined; and in support of the latter objection it was proved, that the witness had been examined, cross-examined, and dismissed from the stand, but was then requested to return the next morning: that two other witnesses were examined before the court adjourned; that next morning, upon search being made, the witness could not be found, although he resided in the city. The court overruled the objections and sealed a bill of exception.

The defendants requested the court to charge the jury upon certain points, which are sufficiently stated in the opinion of the court.

Loomis, for plaintiff in error.

Lowrie, for defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The first error assigned is, that the court below refused to permit the counsel of the plaintiffs in error, who were the defendants there, to read the opinion of the Supreme Court in this case, delivered on a former writ of error, reversing the opinion of the court below and awarding a *venire facias de novo*, saying, "to read it to the court was unnecessary, and to the jury improper." And in connection with this may be taken the answer of the court below to the first point submitted by the counsel of the defendants, whereby the court was requested to charge the jury, "that the decision of the Supreme Court of this State, upon any question or questions of law arising in this case, are binding upon this court and this jury, and that the defendants have a legal right to present through their counsel any such decisions to the consideration of the court and jury." To which the court say, "the first proposition is correct; but the law is for the court, and is to be

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presented to the jury through the court. This court will not permit counsel to appeal to the jurors over the head of this court by *reading* the law to them." The learned Judge further, after speaking of this case having been before the Supreme Court on facts entirely different from those then presented, says; "I have seen so frequent abuse arising from the reading of the opinions of the Judges of the Supreme Court to the jury on a re-trial of reversed cases, that I intend making it a rule of court, hereafter, that it shall not be done," &c. Now although it must be admitted that it belongs to the Judges to answer to questions of law, and to the jury to answer to those of fact, yet every issue of fact, which can only be tried by a jury, involves questions of law that must also be decided by them, if they choose to give a general verdict, from which they cannot be restrained. In doing so, it is true, that they have the direction of the court to aid them in determining the law of the case. But still this shows, when the cause is committed to the decision of a jury, that the facts and the law cannot be separated, but must be determined by them, unless they, of their own will, choose to do so by giving a special verdict, finding the facts only, so as to refer it to the court to pronounce the law upon them, by rendering a judgment for the plaintiff or the defendant, as the law may seem to require. It must also be remembered that questions frequently arise and present themselves on the trial of causes before a jury, consisting partly of fact and partly of law, so closely blended that it is difficult, if not utterly impracticable, to discuss the facts, without at the same time discussing and showing what the law is in relation to them. In order, however, to show what the law is in such cases, there is, perhaps, no better or more accurate mode of doing it than by referring to adjudged cases on the subject. But this can only be done by *reading*, or, at least, stating the principles settled by them. And if it be that the cause on trial has been tried before, and been taken to the Supreme Court of the State, where the law in relation to it has been duly considered and settled, I would suppose that the book containing a report thereof might be safely referred to as having some bearing on the case, and calculated to shed some light on it, notwithstanding new evidence given on the second trial, may have, in some particulars, tended to change the aspect of it. If counsel, however, by whom a party has an unquestionable right to be heard both in regard to the law and facts of the case before the court and jury, are to be restrained by the court from doing so, I am strongly inclined to think that it will seldom, if ever, produce any good, but, on the contrary, will inevitably lead to great inconvenience, if not impracticability, in most cases, and in some probably produce injustice. Still, however, I am not fully prepared to say that the judgment here ought to be reversed on account of this first error assigned. But, I must say, that it appears to me that it would be

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impracticable for the court to carry into effect all that is therein intimated.

The next matter assigned for error is the admission of the note of the testimony of David Noble, taken on a former trial of this cause; Noble having, since that, removed from this State to the State of Missouri. It appeared that Noble, on the former trial, had been produced as a witness by the defendants; that he was examined in chief by them and cross-examined by the plaintiffs, when he was dismissed from the stand, and two other witnesses called and examined. The time of adjournment of the court having then arrived, the counsel of the defendants gave notice to Noble, who was still in court, that he would be wanted for further examination in the morning. In the morning, however, he was missing, and could not be found. The plaintiffs now offered to read the note of his testimony, as taken down under these circumstances; which was objected to by the defendants. The court thought that the note of his testimony ought to be read, the same as if he were dead. It is certainly true, in general, that the note taken of the testimony of a witness present at the former trial of a cause, who happens to be absent out of the State at the time of a subsequent trial thereof, after being proven to be a correct note of his evidence as given by him, may be read in evidence on the subsequent trial, as if he were dead. But, undoubtedly, there may be exceptions to this rule. And, it appears to us, that there is enough in the present case to make it an exception. Although the defendants who called the witness were satisfied with the examination of him at the time he was dismissed from the stand, yet afterwards, before they closed their evidence in support of their defence, they discovered or recollected that they had further evidence to obtain from him material to the issue, not merely rebutting evidence, as the court call it, for from aught that appears on the record it may have been evidence in chief to support their defence, or evidence in explanation of what he testified to on his cross-examination, which would have done away the effect of it as against the defendants. But they were deprived of this by the witness absenting himself voluntarily and improperly, as it would seem. We, therefore, think it nothing more than reasonable that the plaintiffs, if they wished to have the benefit of David Noble's testimony on the second trial, should have taken it under a commission awarded by the court for that purpose, which would have afforded the defendants an opportunity of examining him to the full extent of all that they desired on the first trial. It is not necessary to say whether the note of his testimony, as taken on the former trial, would have been properly admissible, in case from the death of Noble, or other cause, it had become impracticable to take his testimony under a commission. Because, for aught that appears, it might have been taken. We therefore think that the

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court erred in admitting the note taken of his testimony on the former trial.

We also think that the court erred in not answering the sixth point submitted by the defendants with sufficient precision and distinctness. By this point the court was requested to instruct the jury, "that whether a contract was proved, and if so, what it was and the extent of it, were matters exclusively for the consideration of the jury, and that the court had no right, in their charge, to withdraw such matter from the consideration and decision of the jury." To which the court replied, "that as the matter of the sixth point formed the beginning and ending and middle of the speeches, so we have it repeated both in the beginning and end of the points; and it is hoped, by this time, the jury have its importance sufficiently inflicted on their memories without any further remark from the court. The jury are, no doubt, the independent judges of the facts. But a verdict that is independent of the facts and law of the case will be of little use to anybody." We consider that the defendants below were entitled to a distinct and affirmative answer from the court, to their sixth point, such as could not well be misapprehended or misunderstood by the jury. The answer given, however, does not appear to us to be of that character.

Judgment reversed, and a *venire de novo* awarded.

Hemphill *against* Chenie.

The responsibility of a carrier upon the Ohio river does not cease upon the delivery of goods on the wharf, and notice given to the consignee; but it is his duty to attend to the actual delivery.

There is an implied engagement by a consignee with the public, that he will be vigilant and careful in receiving and forwarding goods entrusted to his care; and upon his refusal to receive goods consigned to him, he would be liable to an action by the owner for any loss which might be occasioned thereby.

ERROR to the District Court of *Allegheny* county.

This was an action by A. L. Chenie & Co. against Sharp Hemphill, the owner of a keel-boat upon the Ohio river, to recover the price of a box of dry-goods delivered to him at Pittsburgh, and consigned to Rowland, Smith & Co., Louisville. The court below thus stated the case and instructed the jury, who found a verdict for the plaintiffs for \$447.61.

GRIER, (President).—The plaintiffs are merchants residing in the west. They purchased goods in Philadelphia, which were

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sent in the usual manner by canal to Pittsburgh, and (it being low water in the Ohio river) they were sent to Louisville by a keel-boat, to be conveyed thence by steamboat to their place of destination, the place of the plaintiffs' residence. Goods thus sent are directed to some known forwarding merchants, as consignees, at each point where any one stage of transportation ends and another begins. Pittsburgh and Louisville are two points of this description. The defendant was owner of a keel-boat, which, during the low water of last fall, was engaged in carrying on the Ohio river between this place and Louisville. The plaintiffs claim the value of a box of goods delivered to the defendant's boat to be carried to the port of Louisville, and to be delivered to Rowland, Smith & Co., forwarding merchants of that place. The defendant contends that the goods were delivered according to contract: this the plaintiffs deny; and this forms the issue to be tried.

The clerk of the defendant, who was the agent in receiving and delivering the goods sent by the boat, swears that this box of goods was conveyed safely to Louisville, and deposited on the wharf there; and that he gave notice to the consignees in the forenoon that the boat had arrived, and was unloading; and about 3 o'clock in the afternoon that the goods were on the wharf. Six witnesses have been sworn by the plaintiffs, the consignees and their clerks, who all deny the receipt of the goods by the consignees, or the receiving of any notice of their arrival. Two of the clerks of the consignees swear that the first notice of the arrival of the goods was when the defendant's clerk called with his demand for the freight; and the receiving clerk swears that he immediately went to the wharf in search of this and another box of goods consigned to them; that he found the other box of goods, but this one was gone, or at least was not to be found, and never was received.

Although it might admit of considerable doubt whether any notice was given to the consignees before the loss of these goods from the wharf, yet it will be necessary for us to examine this case in view of a different state of facts. If the goods had been actually received, or put into the actual care or possession of the consignees or their servants, there could be no doubt that that would be a fulfilment of the defendant's contract, whether the delivery were made on the wharf or at the warehouse of the consignee. But the defendant's clerk does not himself swear that the consignees ever actually received the goods, or that the box was put into the actual possession of the consignees or their agents. But it is contended that, according to the custom of the port of Louisville and the other cities on these western rivers, the depositing of goods on the wharf and giving notice to the consignee, constitute a sufficient delivery in law, whether the consignee actually receives the goods or not. In other words, the care and responsibility of the carrier cease, the moment he has deposited goods on

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the wharf and sent notice to the consignee, and this whether the consignee refuses or neglects to receive them or not. If, in such cases, the carrier may abandon the goods on the wharf, and the property of the distant owners thus be left as a subject of plunder to the first finder, it must be admitted that the subject is one of considerable interest to those whose property is committed to the chances of transportation on these western waters, and has necessarily to pass through the hands of so many different carriers and consignees.

It must be apparent to every one, that however much steamboat men and other carriers on our rivers may affect the diction and phraseology of maritime cities in their bills of lading, insurances, &c., yet that a hasty or indiscriminate application of our commercial and maritime code of laws and customs might not be convenient or judicious. Goods may be "shipped" on board steamboats and canal-boats from the "port" of Pittsburgh to the "port" of Louisville; and yet it might happen that the rules of commercial law, which regulate trade on the ocean and freight shipped from Liverpool to Philadelphia, might be very inconvenient of application to our western waters. Hence, in *Cope v. Cordova*, (1 *Rawle* 103), which decides that "the liability of the ship-owner ceases when the goods are landed at the usual wharf," many good reasons are given why such a rule exists in the trade between two maritime cities, which cannot apply to this shifting transportation from point to point on our western waters; and the learned Judge who delivers the opinion of the Supreme Court in that case, is careful to observe that they do not intend by that decision to interfere with the law that regulates the internal or coasting trade, or at all to dissent from the case of *Ostrander v. Brown*, (15 *Johns.* 39).

It is true, we have it in evidence that the custom of trade at Louisville, and at all the ports on the river, is, not that the carrier shall deliver at the warehouse of the consignee, but on the wharf; and it is true also that every well-established custom of trade is presumed to be known to and incorporated by the parties in their contracts. But what is the custom as proved in this case? It is, that the carrier gives notice of the arrival of his vessel at the wharf to the consignee, and usually before the goods are unloaded the clerk or drayman of the consignee is there ready to receive; if not, when the goods are deposited on the wharf, the consignee is again notified of the fact, and always sends and takes them away, as very few instances have been known when the goods are not immediately taken possession of by the consignee. A case rarely happens, except when the consignee denies (as he does in this case) that he has received notice; or, having received it, has forgotten it, or was too busy to attend to it.

The witnesses have not testified to any settled custom in case the consignee refuse or neglect to send and take possession of the

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goods on the wharf. One witness states that in one instance, where the consignee did not attend to receive possession of the goods and take them under his care, after notice given that they had arrived, he abandoned them on the beach; but says further that he will not testify that to be the custom in such cases. Another witness swears that it is "usual to hold on to the goods till the consignee sends for them;" "and if the consignees do not call for the goods by sun-down, they are stored in a warehouse, where the consignee may receive them on paying the freight." Custom or no custom, that should be the conduct of every prudent and honest carrier. It must be recollected that the consignee is not bound to receive the goods where he is not owner; he is often a stranger to the owner. Could an honest man, who has the goods of a distant owner in his possession, be justifiable in abandoning them to thieves, or standing by and suffering them to be stolen, as must have been the case here, under pretence that he has sent word to the consignee, who is not bound to receive them, that the goods are there?

The carrier should insist upon an acceptance or refusal of the goods by the consignee; he should tender the goods to the consignee; if the consignee refuse or neglect to accept possession of them, the course of the carrier is plain: let him store them in a warehouse, with orders to deliver to the consignee on payment of freight and expenses. When he does so, his duty is discharged, and his liabilities as carrier cease; and not till then. A contrary doctrine would leave merchandise transported on our western waters the mere prey of thieves and robbers. The hands of the boat may plunder the goods with perfect impunity, and relieve the owners from responsibility by swearing that the goods were on the wharf; and if he did not come for them, it was his own fault. And to what purpose that the consignees swear they received no notice? It will be argued, as in the present case, that an affirmative witness is worth a dozen negative witnesses. If the defendant's agents had in this case put the goods into the actual care or possession of the consignees on the wharf at Louisville; or if, upon the consignees' refusal or neglect to take the goods out of his care, they had deposited them for safe-keeping in some warehouse, or other safe place, they should not be made liable. But if you have no evidence of such facts; if the goods were stolen either before defendant's boat left the wharf, or were abandoned there before any acceptance or receipt of them by the consignees, you should find a verdict for the plaintiffs for the value of the goods lost. The depositing the goods on the wharf and sending notice to the consignee, even taking the testimony of the defendant's agent and witness to be true, do not constitute a delivery, constructively, if the goods were not actually accepted or received into the possession of the consignees, or their agents or servants. In conclusion, I would remark, in the words of

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ROGERS, J. (6 *Whart.* 519): "If we once permit carriers to relieve themselves from the consequences arising from their or their agents' negligence, there will be no want of pretences and excuses for that purpose, proved, as they can readily be, by the oaths of the persons whose fault or fraud has caused the loss. To avoid all temptations of this kind, the rule which places common carriers on a different footing from other bailees, has been wisely adopted, and must be firmly enforced. The great and increasing extent of our internal trade renders all such questions extremely important; and there is great danger in relaxing the ancient rules, which must end in producing uncertainty and of course numerous and perplexing controversies."

Black, for plaintiff in error, cited 3 *Watts & Serg.* 21; 4 *T. R.* 542; 5 *Ib.* 389; 6 *Whart.* 517; 15 *Johns.* 42.

Scully and Wylie, contra, cited 1 *Johns.* 577; *Ros. Ev.* 85; 1 *Rawle* 203; *Story on Bail.* 453, 532, 542; 2 *Kent Com.* 604; 2 *Barn. & Ald.* 702.

The opinion of the Court was delivered by

ROGERS, J.—The facts and principles which govern the case are accurately stated by Mr. Justice Grier, and we affirm the judgment for the reasons given in the charge. In answer, however, to one remark, I must be permitted to say, that it is by no means clear that where a consignee neglects or refuses to receive goods consigned to him, without cause, the owner is without remedy; for I must dissent from the position that a consignee is not bound ordinarily to receive goods consigned to him. Has a consignee a right arbitrarily to refuse a consignment by a distant owner, who trusts to his implied engagement with the public that he will be vigilant and careful in forwarding goods entrusted to his care? A cumulative remedy is no anomaly in the law; and the safety of our internal trade, which is becoming of such immense importance, requires a strict accountability from consignees as well as carriers; and can it be tolerated that agents who are indispensably connected with it, may at pleasure shrink from a responsibility which they have voluntarily assumed, and which the commercial world have a right to suppose they will faithfully and diligently perform? In the case in hand, it is admitted that the owner has lost his property from the default of the carrier or consignee, or both; and justice and fair dealing require that his remedy should not be even doubtful. It will not do, where the exigency of the case requires it, to allow consignee or carrier respectively to shift the responsibility from themselves on the shoulders of the other. Thus, in this case, if the owner had brought suit against the consignee, he would be met by the defence that the carrier was liable; and between these conflicting interests the injured party would have no

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redress whatever. But, be this as it may, the carrier in the first place is answerable to the owner, and he can only discharge himself from liability by the most clear and decisive proof of an actual delivery to the consignee. An offer to deliver, as is held in *Ostrander v. Brown*, (15 *Johns.* 42), does not relieve him from the care and custody of goods which he has under his charge.

The testimony was properly excluded, because, as is truly said, the objection assumes the matter in issue, viz., which was liable, the consignee or the carrier. Besides, the liability of the consignee is contingent, which forms no objection to the competency of his testimony.

Judgment affirmed.

Eichbaum *against* Irons.

The members of a committee appointed by a political meeting to provide a free dinner for the party are personally liable for the bill.

THIS was an action of *assumpsit*, brought in the District Court of *Allegheny* county, by John Irons against William Eichbaum, John D. Davis, William Black, and William D. Darlington. The case was this.

When the event of the presidential election in 1840 had been ascertained, General Harrison's friends in Pittsburgh and Allegheny, met at the plaintiff's tavern, their late head-quarters, to discuss the propriety of celebrating their success by a public entertainment. It was resolved that a free dinner should be prepared by the plaintiff to compensate him for the use of his house as a political rendezvous during the canvass, and for the consequent wear of his carpets and furniture; or, as a witness expressed it, to give him a benefit. The meeting appointed a committee of thirteen to order the dinner and make the arrangements; and another committee, of the same number, to invite the guests. Mr Black was a member of the committee of arrangements; and the other defendants were members of the committee of invitations. On the following day, these committees met a concourse of people of the same political stamp, at the same place; and the whole being organized as an original meeting, by placing Mr Eichbaum in the chair, the expediency of the measure was warmly contested, among others, by Davis and Eichbaum, who spoke and voted against it, but eventually succumbed to the majority, by whom the measure was carried anew, and a committee appointed to solicit subscriptions. At the conclusion, the plaintiff was called in, and directed

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to prepare a dinner for 1000 persons, and serve it at Taaffe's warehouse, where 4000 people, of all political parties, subsequently partook of it with wonderful cordiality. Mr Davis, who was dissatisfied with the measure, called on the plaintiff a few days after the dinner was ordered, stated to him that it would be very difficult to procure money, and requested him to give the matter up; but the plaintiff became excited, and declared that the dinner should go on, though he were to pay for it himself. At this time the provisions had been laid in, and were in the hands of the cook. The defendants alleged that payments had incautiously been made to the plaintiff, without taking receipts; but, as they were unable to prove them, they were compelled to insist that they were not personally liable. The plaintiff, who had assigned his claim in payment of a debt, and was examined without objection, testified that he furnished the dinner on the order of the whig party, and the committee who employed him; that the committee were the only persons he had to look to; that the meeting, at his house, when the order was given, was a public and general one; and that he thought it was the committee who contracted with him. On these facts the court directed a verdict for the plaintiff.

The point of liability was argued here by

Williams and Miller, for the defendants; and by
Darragh and M'Candless, for the plaintiff.

The opinion of the Court was delivered by

GIBSON, C. J. — This case is unique, but readily resolvable on principle. It seemed, at first, to resemble the case of a committee sued for the price of meats and wines furnished on its order to a club; but though the defendants acted in obedience to a constituency, it was, unlike a club, which is a permanent body, an intangible and irresponsible one. The plaintiff, being examined without objection, testified that he furnished the dinner on the order of the whig party, but that it was to the committee he looked for payment. It is probable that neither he nor they spent a thought on the subject; but it is not, therefore, to be concluded that he agreed to give the dinner for nothing; and the responsibilities of the parties concerned are to be determined on the ordinary principles of the law of contracts. The facts are, that the defendants and others, being a committee constituted by a popular meeting to order and manage a dinner, contracted with the plaintiff to furnish it, and directed the secretary of the meeting to report the proceeding to the Tippecanoe Club, an affiliated society, for its approbation.

Now it will not be pretended that nobody was responsible to the plaintiff for the order; and, if the defendants were not, who else was? Were they to be viewed as the agents of a club, we would have something palpable to deal with. The question would

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be, whether they had become personally liable by having exceeded their authority, or whether they had not contracted on the credit of their constituents. But a club is a definite association, organized for indefinite existence: not an ephemeral meeting, for a particular occasion, to be lost in the crowd at its dissolution. It would be unreasonable to presume that the plaintiff agreed to trust to a responsibility so desperate, or furnish a dinner on the credit of a meeting which had vanished into nothing. It was already defunct; and we are not to imagine that the plaintiff consented to look to a body which had lost its individuality by the dispersion of its members in the general mass. But the question would not depend on the law of partnership, even were such a meeting to be treated as a club; for though Lord ELDON, in *Beaumont v. Meredith*, (3 Vez. & Beat. 180), and Lord ABINGER, in *Fleming v. Hector*, (2 Meeson & Welsb. 179), seemed to have thought that a member of a club is a partner, the notion was exploded by Chief Justice TYNDALE, in the last trial of *Todd v. Emly*, cited in *Wordsworth on Joint Stock Companies* 183. Neither is it determinable on the law of principal and agent; for there was no principal. At first, I thought the credit might have been given to the primary meetings on the authority of those cases in which officers have been held liable to have contracted on the credit of the government; but the certainty of payment, in those instances, was so great as to make the moral responsibility of the government the preferable security. Not so the moral responsibility of a populace, which is infinitely weakened by being infinitely divided. In a case like this, the usual presumption of credit is inverted; and, in the absence of evidence to the contrary, the vendor is supposed to have relied on the responsibility of the persons who gave the order. What we have to do, then, is to determine how far each of the defendants was a party to it.

When several dine together at a tavern, each is liable for the reckoning (*Collyer on Partn.* 25, *note w*). But, I take it, they are liable jointly and not severally; for though only one should order, those who approve of it become parties, except where credit is given to one, in exclusion to those who happen to be his guests. This principle is deducible from *Delauney v. Strickland*, (4 Stark. R. 366). Did the defendants, then, all concur in the order given for the dinner in question? If they did not, the plaintiff cannot recover.

It is not disputed that they were present when the measure was definitively adopted; but it is proved that Davis and Eichbaum opposed it while it was under consideration. What then? They at last submitted to the majority, and made the resolution their own. In *Braithwaite v. Skofield*, (9 B. & C. 401), a member of a committee who was present at the adoption of a resolution to have certain work done, was held liable to the tradesmen. Every member present assents beforehand to whatever the majority may

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do, and becomes a party to acts done, it may be, directly against his will. If he would escape responsibility for them, he ought to protest, and throw up his membership on the spot; and there was no evidence that any of the defendants did so. On the contrary, they all remained till the meeting was dissolved, and the order given. It is true, that Mr Davis afterwards desired the plaintiff to give the matter up; but the dinner was in preparation, and it was too late to retract. Of what importance, then, is the disputed fact of his having partook of the repast with the rest? Had he done so, his final accession would, according to *Delauney v. Strickland*, have made him liable despite of other considerations; but he had become irrecoverably liable by the order of the committee, given in his presence, and apparently with his approbation. The defendants have not pleaded the non-joinder of the other members in abatement; and the evidence showed such a joint liability of those who have been sued, as warranted the direction.

Judgment affirmed.

Mercer County *against* Coovert.

Upon a contract to guarantee the payment of a certain sum of money, in consideration of the building of a bridge by the county at a place fixed by a report of viewers, if the location be changed, there can be no recovery.

ERROR to the District Court of *Mercer* county.

Mercer county for the use of Alfred and Moses Corey against Thomas Coovert and others. By a proceeding under the Act of Assembly in the Court of Quarter Sessions, viewers located and reported favourably to the building of a bridge at a particular point over the Mahoning river. This report was approved by the grand jury and the court. After which the defendants signed an agreement to guarantee the payment of \$1300 to the commissioners of the county to aid in its construction. The commissioners went to the place with a view of examining the ground, and there discovered among the citizens a diversity of opinion with regard to the place of location; some were in favour of the point fixed by the viewers, others for a point 100 rods below, and others for 50 rods above. The commissioners agreed that the place fixed by the viewers was not the proper one, but they would have the bridge built either above or below; and for the purpose of determining this, they submitted the question to be decided by the citizens, by an election at which any one should have a vote who would pay one dollar towards the construction of the bridge. The

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election was held, and a decision was thereby made in favour of the site above; at this election it was proved that children had voted. Immediately one of the defendants, at the election, objected to the course, and endeavoured to prevent it; and after it was held, gave notice to the commissioners of his objection, and requested that his name should be withdrawn from the guaranty. But this was refused. The commissioners entered into a contract with Alfred and Moses Corey to build the bridge for \$3800, at the point fixed by the election; in part payment of which, this guaranty, and a subscription paper for part of the amount, were transferred to the contractors. But part of the money subscribed was paid, and this suit was brought upon the guaranty to recover the balance.

THOMPSON (President) instructed the jury, that upon this state of facts the plaintiff was not entitled to recover; that the change of location of the bridge by the commissioners, especially in view of the manner and circumstances under which it was made, absolved the defendants from their contract.

Stevenson, for plaintiff in error, cited 2 P. R. 471.

Patterson and Pearson, for defendant in error.

The opinion of the Court was delivered by

GIBSON, C. J.—What is the contract on which the defendants were sued? They offered to pay a specified sum towards the expense of a bridge at a particular spot, the plaintiff paying the residue. The bridge was not built at the spot, but at another less advantageous to some of the defendants. And why was the site of it changed? Not because it was an impracticable one, but because the expense of a bridge there would have been greater than the county could conveniently bear. But had the fact been otherwise, it would not have entitled the plaintiff to dispense with the condition, and yet hold the defendants to their offer to pay; for they had not offered to contribute to the expense of a bridge at any other place. But the difference in the amount of the expense induced the commissioners to depart from the terms of the defendants' offer, and to propose two other sites, leaving it to the people to choose between them by an election at which boys of the age of five years were admitted to vote; and yet the defendants are gravely supposed to be bound by their offer, though the condition on which it was made has been put aside by this miserable farce! The case bears no resemblance to *Irvin v. The Turnpike Company*, in which the contract of subscription to the stock was unconditional and prescribed by statute. In that case, the commissioners to receive signatures had no power to act upon stipulations, or receive conditional subscriptions; and the defendant knew it. His written promise to pay was absolute; and as he had

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entered into it with his eyes open, he was held to have done so without any mental reservation incompatible with the paramount and inherent right of the State to make alterations in the plan of the route for the public good. And to have held otherwise, would have given the other subscribers to the stock the same right to refuse payment of their instalments, whether the alteration were detrimental to their property to more than the value of a farthing, or perhaps not even so much. Here, however, the terms of the contract were originally within the control of the defendants, from whom the overture came; and they expressly inserted a fundamental condition in it, as they had a right to do. Had this condition not been expressed, but tacitly understood, the case would have come nearer to *Irvin v. The Turnpike Company*; but still it would have been open to the defendants to show that both parties had acted on an implicit stipulation that the bridge should be built at the particular place; a measure that was not open to Mr Irvin, who was bound to know that the commissioners in that case had no power to make stipulations either express or implied, and that it was an act of gross imprudence to rely on them. In this case the whole was a matter of compact, restricted as to terms only by the consent of the parties; and as the defendants were at liberty to insert a fundamental condition in their contract, they were certainly at liberty to insist on it. That each of them ratified the change made by the commissioners, has not been seriously contended; and without showing a joint liability on the part of all, there can be no recovery against them. The other exceptions either are unfounded, or relate to matter of fact which is not examinable here.

Judgment affirmed.

Pattison against Stewart.

A conveyance by a father to his sons in consideration of an agreement on their part to pay his debts, is not fraudulent or void as to the creditors of the father.

ERROR to the Common Pleas of *Washington* county.

This was an action of ejectment by John Pattison against David Stewart and others, to recover a tract of 200 acres of land. The plaintiff gave evidence to show that the title to the land in dispute was formerly in Denny M'Clure, who in 1832 or 1833 died, and John Gunn was appointed his administrator; that John M'Clure, his son, obtained a judgment against the administrator for a debt due him from Denny M'Clure before and at the time of the conveyance of the land in dispute to his sons, William and James

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M'Clure, on which an execution was sued out and levied on the land in dispute; an inquisition and sale of the premises to the plaintiff, and sheriff's deed.

The defendants gave in evidence a deed from Denny M'Clure and Margaret, his wife, to William and James M'Clure, two of his sons, dated September 10th 1832, for the consideration stated in the deed of \$600. Article of agreement between William and James M'Clure and David Stewart, dated June 14th 1833, for the sale of the land for \$1000, \$400 in hand, and \$100 a year thereafter. Deed in pursuance dated June 17th 1833; payment of the \$400 in hand, and notes given for the residue. Both deeds were recorded the day after they were executed.

The plaintiff gave evidence tending to show that Denny M'Clure, when he executed the deed to his sons, was embarrassed in circumstances, and that the deed was made without any valuable consideration, and with intent by all the parties thereto, to defraud the creditors of Denny M'Clure, the grantor. He also gave evidence tending to show that David Stewart, when he accepted the deed and paid the purchase money, had notice of the fraud and that the conveyance by Denny M'Clure and his wife to William and James M'Clure had been made without consideration, and with intent to defraud the creditors of Denny M'Clure.

There was also evidence tending to show that William and James M'Clure had, in consideration of the deed of September 10th 1832, undertaken to Denny M'Clure to pay his debts, and that they had paid some of them out of the money received from David Stewart as the first payment on the land.

The court, after recapitulating the evidence, instructed the jury that if they believed that the deed was made by the father to his sons in consideration of an agreement on their part to pay the father's debts, it was a good and valid consideration, and the conveyance was not fraudulent as to creditors.

The instruction of the court was the subject of the error assigned.

Leet and Marsh, for plaintiff in error, cited 12 *Serg. & Rawle* 198; 2 *P. R.* 82; 6 *Binn.* 388; 1 *Rawle* 163; 3 *P. R.* 83; 4 *Johns.* 598.

M'Kennon, contra, whom the court declined to hear.

The opinion of the Court was delivered by

KENNEDY, J.—The only question presented in this case is in regard to the validity of the deed of conveyance made by Denny M'Clure to William and James M'Clure, two of his sons, for the land in dispute, from whom the defendant bought and claims to hold it. The plaintiff claims the land as a purchaser thereof at a sheriff's sale, made under a judgment and execution against the

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administrators of Denny M'Clure, for a debt owing by him to John M'Clure, another son, before and at the time the father conveyed the land to William and James. The plaintiff, on the trial of the cause, alleged and endeavoured to prove that the deed from Denny M'Clure to his sons William and James, was either made for the purpose of defrauding his creditors, or was made without valuable consideration, and was therefore void as against his creditors. Evidence, however, was given on the part of the defendant, tending to prove that William and James M'Clure, as the consideration for receiving the deed from their father, were to pay all his debts; and that they had actually paid some of them, besides maintaining their father and mother during their respective lives. The court left it as a matter of fact to the jury, to decide whether this was the consideration for making the deed or not; and if they found that it was, the deed was good against the creditors as well as all others, and the plaintiff could not recover. The plaintiff's counsel objected to the charge of the court in this respect, and it is assigned for error here. We, however, are of the opinion that the instruction given by the court to the jury on this point was correct. The only difficulty would seem rather to have been, as to the question of fact whether such was the real consideration of the deed or not, which was very properly left by the court to the decision of the jury. It would be strange, if not incongruous, to say that such a consideration was not sufficient to support the deed against the creditors of the grantor, seeing it was made specially for the purpose of paying and satisfying their claims. John M'Clure the son, if a creditor at the time his father conveyed the land to William and James, might have sued the latter, and, after having obtained judgment against them for the amount of his claim, have taken the land in execution, provided they still held it under the deed; but on a judgment obtained against his father's personal representatives, it is manifest that he could not do so, as the property in the land had passed from the father in his lifetime by the deed of conveyance thereof to his sons William and James. To hold that a deed of conveyance made by a debtor of his property, founded on such a consideration, is not good against his creditors, would seem to deprive him of the only means that he may have of paying them. It may be of the utmost importance to him, and likewise to his creditors too, that he should be permitted to sell his property, on a reasonable credit, for money, so as to obtain a sufficient amount to pay them, when a sale made for cash in hand might fall far short of it.

Judgment affirmed.

Floyd *against* Bovard.

A consignee, in whose hands goods are placed to be sold, may set up the consignee's want of title as a defence to an action for the price of them.

The cross-examination of a witness must be confined to the subject-matter about which he was called to testify; if he be acquainted with other facts material to the issue, he may be recalled by the other party, who thereby makes him his own witness, and is subject to all the rules which govern his examination.

If a witness be called and examined by the plaintiff, he may, at any subsequent stage of the trial, be called and examined by the defendant, as to any fact within his knowledge material to the defence, although he may be directly interested in defeating the plaintiff's recovery.

ERROR to the District Court of *Allegheny* county.

George Bovard against John Floyd & Company. This was an action of *assumpsit*, brought by the plaintiff to recover the proceeds of a quantity of pig-iron sold by the defendants as commission merchants.

Robert J. M'Gowan, an iron-master in failing circumstances, had assigned a quantity of pig-metal to David M'Junkin, one of his creditors; and had subsequently assigned to Alfred Nesmith whatever should remain of it after satisfaction of M'Junkin's debt. The plaintiff, who was also a creditor of M'Gowan, applied for iron to pay his debt, but it was refused him; he, however, assisted M'Junkin to take away iron enough to satisfy his debt, and sent the surplus to the defendants to be sold on his account. The iron was sold, and credited on the books of the defendants to Bovard. This action having been brought to recover the nett proceeds of sale, Nesmith interposed, and set up Bovard's want of title to the iron as a defence to the action for the price. The court below was of opinion that the defence was not available, and that the plaintiff was entitled to recover.

On the trial the plaintiff called and examined George Floyd as a witness. After the plaintiff had concluded his evidence, the defendant called George Floyd, and proposed to examine him about other facts within his knowledge, material to the defence. The plaintiff objected, and the court sustained the objection, and sealed a bill of exception at the instance of the defendants.

Miller and *M'Candless*, for plaintiffs in error, on the first point, cited 2 *Stor. Ag.* 207; 9 *Bing.* 382; 6 *Whart.* 418; 3 *M. & S.* 574.

Dunlop, contra, cited *Stor. Eq.* 122, 240, 296; 33 *Eng. Com. Law* 135; 5 *Mad. Chan.* 36; 5 *Eng. Ch. Rep.* 345.

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The opinion of the Court was delivered by

GIBSON, C. J.—The facts appear to be, that M'Gowan, an iron-master in failing circumstances, had assigned a quantity of pig-metal to M'Junkin, his creditor; and had subsequently assigned to Nesmith whatever should remain of it after satisfaction of M'Junkin's debt. Bovard, the plaintiff, who was likewise a creditor and M'Gowan's manager, applied for metal also; but being refused, assisted M'Junkin to take away enough to satisfy his debt, and sent the surplus to the defendant to be sold on his account. Nesmith now intervenes, and claims the proceeds under the assignment to him; and the question is, whether Bovard's want of title to the metal, is want of title to the price of it. To state such a case is to decide it. Besides, the very principle was ruled in *King v. Richards*, (6 *Whart.* 418), in which the bailee of goods surreptitiously procured by the bailor, was allowed to set up the bailor's want of title to the goods as a defence to an action for them. Then if the defendants could have set up the plaintiff's want of title to an action for the metal, they can equally set it up to an action for the substitute. It is immaterial that the plaintiff took the metal before the assignment to Nesmith. His possession could not give him the property, or hinder it from passing to another; and to show that he had no title to the metal, is to show that he has no title to the proceeds of it.

Unless the testimony of Floyd was offered to contradict the deposition of Josiah M'Junkin, which had been read on the other side—a matter that does not appear by the bill of exceptions—it was erroneously rejected. By having himself called him as a witness, the plaintiff had removed the objection which lay to him as a party, in the first instance. It is true, as was ruled in *Ellmaker v. Buckley*, (16 *Serg. & Rawle* 72), that the defendants could not cross-examine him as the plaintiff's witness; and that they had no choice but to call him themselves. It is true, also, as has been said, (1 *Stark. Ev.* 162), that the same witness may know distinct parts of the transaction, the one making for the plaintiff and the other for the defendant; and that there is no good reason, when each calls him in turn, why each should not cross-examine him in turn, or be prevented from putting leading questions. The difficulty is to find a reason for those English decisions which hold the parties to a different course, and allow the witness to be cross-examined to every transaction within his knowledge in the hands of the party who is first compelled to call him. This would seem to be foreign to the end of a cross-examination, which is not to give the party an advantage in the manner of introducing the facts of his case, but to test the credibility of the witness as to what he has testified; for, it is said, that he shall not be cross-examined to collateral facts, or to matters unconnected with the subject of inquiry, because it would lead to complication and prolixity; (1 *Stark. Ev.* 154); and, I may add, that to reward a party with the privi-

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lege of putting leading questions for bringing forward a branch of his case out of its order, would reward him for throwing the cause into confusion. Where the testimony of a witness is required to establish a fact which is part of the plaintiff's case, and also another fact which is part of the defence, it is a dictate of justice that no advantage be given to either party in the manner of eliciting it. But an advantage is, in truth, given, and for no adequate reason, when a party is allowed to bring out his part of the case by cross-examination, merely because the opposite party had been compelled to call the witness in the first instance. In *Rex v. Brooke*, (2 Stark. Ca. 473), and *Phillips v. Eamer*, (1 Esp. Ca. 357), the witness was allowed to be cross-examined because he had been merely sworn, though he even had not been examined. The object could not have been to sift what he had said, for he had said nothing; or to test his credibility, for it had no connection with anything that had transpired in the cause. There ought to be better authority for such a course, than one or two hasty decisions of a single Judge in the course of a trial. But the authority of these *Nisi Prius* cases is shaken to its centre by *Reed v. James*, (1 Stark. Ca. 132); *Davis v. Dale*, (1 Moody & Mal. 514), and *Simpson v. Smith*, (1 Stark. Ev. 162, note (n)). It would be better to say that each party should call the witness to serve his turn, and make him his own for the time being, than to entangle the justice of the case in those distinctions with which the English Judges have surrounded it. A plaintiff may be compelled to call the defendant's principal witness to some matter of formal proof; and it is easy to see that the justice of the case would not be promoted by allowing the defendant, for that reason, to break in on the plaintiff's order of proof, by introducing his defence, and eliciting the testimony in support of it by leading questions. But the question before us is not involved in these difficulties. The objection was not to the manner of examination, but to examination in any manner. By the English practice, he might have been examined to the new matter, when called by the other side, and why not when called in a subsequent stage of the cause? The plaintiff himself had called him to prove a part of his case, the witness consenting to be sworn; and had not this been done, he certainly would have been incompetent to testify for his co-defendant. And why? Because his interest raised a presumption unfavourable to his credibility, which would not have been rebutted. But did not the plaintiff rebut it when he produced him as a witness worthy of credit, and had the benefit of his testimony? Or did he assert no more than that he was worthy of credit only when he testified against his own interest? The man who is honest enough to declare the whole truth, when it makes against him, will be honest enough to declare no more than the truth in his own favour. It would give a party an unjust advantage to let him pick out particular parts of a witness's testimony and reject the rest. But the

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matter does not rest on principle alone; for it is a familiar rule that a party cannot discredit his own witness, or show his incompetency. If the objection, then, was made to the competency of the witness, and not to the substance of his testimony, he was erroneously rejected. The cause goes back on another ground; and, if there was error in this respect, it can be avoided at the trial.

Judgment reversed, and a *venire de novo* awarded.

Gillis *against* M'Kinney.

A tenant in common of a tract of land may maintain *assumpsit* against his co-tenant to recover his share of the rent of the premises which they had demised to a third person, upon proof that the whole rent had been paid to the defendant, who promised to pay to the plaintiff his share of it.

ERROR to the Common Pleas of *Jefferson* county.

James L. Gillis against Robert M'Kinney. Action on the case in *assumpsit*. The case is fully stated in the opinion of the court.

Jenks and Buffington, for plaintiff in error, cited 2 *Whart.* 40; 1 *Chit. Pl.* 379; 7 *Watts* 380.

Shunk, for defendant in error, cited 10 *Serg. & Rawle* 219; 4 *Watts & Serg.* 14.

The opinion of the Court was delivered by

KENNEDY, J.—This action is *assumpsit*, instituted in the court below by the plaintiff in error to recover from the defendant the value of a quantity of lumber taken and disposed of by the latter, which the former alleges belonged to him. It appears from the evidence that they were tenants in common of a tract of land on which there were a saw-mill and some other buildings; that they let the property to a man of the name of Mead on shares; that is, Mead was to give the plaintiff and defendant one-half, or each one-fourth of all the lumber he should saw at the mill. He continued to occupy the property and saw lumber at the mill from the autumn of 1839 till some time in 1841. In the spring of 1840, all the lumber sawed at the mill, and coming to the plaintiff and the defendant as their proportion, was taken away and disposed of by the defendant, under an agreement that the plaintiff should have an equal quantity at the mill for it in the spring of 1841. The defendant, however, according to the evidence, instead of leaving such equal quantity for the plaintiff at the mill in the

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spring of 1841, took all the lumber that was coming from Mead to them as their proportion, and disposed of it. Some evidence was also given of repairs and buildings made on the land, paid for mostly by the defendant, for which the plaintiff denied his liability to contribute, because done without his consent, and contrary to an agreement made between them, that such repairs or buildings should not be put on the property without the consent of both parties.

The court below, after the evidence was closed on both sides, at the instance of the counsel for the defendant, charged the jury, that as the evidence on the part of the plaintiff showed that he and the defendant were tenants in common of the land and the saw-mill, *assumpsit* would not lie for the plaintiff's claim; to which the plaintiff's counsel excepted, and have assigned the same for error here.

The evidence on the part of the plaintiff went clearly to show an agreement of the defendant, that, if the plaintiff's agent (the plaintiff himself being absent in the State of New York) would permit the defendant to take away and dispose of, for his own use, all the lumber at the mill in the spring of 1840 belonging to both of them, he, the defendant, would leave an equal quantity for the plaintiff at the mill in the spring of 1841; and that the defendant under this agreement took the lumber, amounting in all to about 113,000 feet; and that instead of leaving any lumber for the plaintiff at the mill in the spring of 1841, he took all that was coming to them from Mead, the tenant, and disposed of it. Now, if the jury should have believed the evidence going to establish these facts, there can be no doubt but the plaintiff was entitled to maintain this action on the ground that the defendant had broken his promise and engagement made with the plaintiff in the most express terms. But suppose there had been no express engagement of the kind, but that the defendant had taken all the lumber coming from Mead to him and the plaintiff as rent, and sold it; he would unquestionably have been accountable to the plaintiff for his proportion of it, in *assumpsit* for money had and received. If the rent had been payable in money, and the whole of it had been received by the defendant, it will, I apprehend, strike the mind of every one, at the first blush, that *assumpsit* for money had and received would lie against him by the plaintiff to recover his proportion. But the circumstance of its being payable in lumber can make no difference after the defendant had converted it into money. It might as well be said that one of two joint obligees, who receives the whole amount of the bond, would not be liable in an action of *assumpsit* to his co-obligee for his proportion of it, as that a co-lessor, who receives the whole of the rent, is not liable to his co-lessor for his proportion of it in an action of *assumpsit*. In *Coles v. Coles*, (15 Johns. 159), it was held, that if two tenants in common sell the common property, and one of them receives the whole

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of the purchase money, the other may have *assumpsit* for his proportion. And in *Brigham v. Eveleth*, (9 Mass. 538), it was adjudged, if one tenant in common receive the whole profits of the common property, that he is liable to be sued in *assumpsit* by his co-tenant for his proportion; which shows that this action is suited to the case between these parties under any view that can be taken of it. So far as the evidence discloses any matters of account between the parties, to be settled and adjusted, relating to the common property, a jury would be quite as competent, under the direction of the court, to do it, as auditors in an action of account-render; which latter action ought never to be resorted to when *assumpsit* will answer the same end, because it is attended with great delay and some perplexity.

Judgment reversed, and a *venire de novo* awarded.

Johnson against Lines.

An over-supply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against him only for so much as was actually needed; and it is the tradesman's duty to acquaint himself with the infant's circumstances and necessities, as well as to take notice of supplies by other tradesmen.

The rule that no one may deal with an infant, is subject to the exception that a stranger may supply him with necessities; but to bring the contract within it, the burthen of proving the existence of an actual necessity lies on the tradesman, who, in regard to that, acts at his peril.

Though the permission of a guardian, in a doubtful case, may excuse the unfitness of a supply for the infant's degree, yet no permission to deal for what is manifestly improper in quantity or sort, can subject the infant to liability in favour of one who has dealt with him *malâ fide*; but the guardian may make himself personally liable by a permission which amounts to an order.

What are necessities, is a question mixed of fact and law; but where an excessive supply has manifestly been so gross as to shock the senses, the court may declare it to be inordinate in point of law.

ERROR to the Common Pleas of Washington county.

Edward L. Lines and William W. Scott, trading under the firm of Lines & Scott, against David Eckert, administrator of John Johnson.

This was an action of *assumpsit*. The declaration contained the common money counts; to which the defendant pleaded that the intestate was an infant at the time of the supposed promises; and the plaintiffs replied that the goods provided were necessities. The intestate, whose infancy was admitted, contracted a debt with the plaintiffs for goods sold and monies advanced, as appeared by

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their account, between the 9th October 1836, and the 30th January 1838, to the amount of \$1063.27. The items consisted in a great measure of fancy articles, which a wasteful boy, uncontrolled by his parents or guardian, would be apt to purchase. The infant had a guardian; but it did not appear that he exercised any care or control over him, or that he had been consulted in relation to his dealings.

The defendant asked the court to charge "that the plaintiffs had no right to deal with the minor even for necessities, unless the guardian refused to furnish him with them." The court charged "that the plaintiffs had no right to deal with the deceased unless by the *permission*, express or implied, of the guardian; or unless the guardian refused to furnish necessities to his ward." The defendant also prayed direction, "that if the plaintiffs were justified in dealing with him, their bill is so exorbitant that the plaintiffs themselves could not have considered them necessities, and therefore are not entitled to recover:" to which the court responded, that "what are necessities is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances and pursuits of the man. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of these items necessary. Some of them, they must have known, were *not* necessary. The plaintiffs cannot recover for what are not necessities." The defendant excepted. Verdict and judgment for the plaintiffs.

Marsh, for the plaintiff in error, cited 2 *Serg. & Rawle* 44; 2 *Eng. Com. L.* 600.

M'Kennon, for the defendants in error, cited 7 *Watts* 344; 3 *Day* 37; 1 *Bibb* 519; 7 *Watts* 237; 8 *T. R.* 578; 1 *Esp. R.* 212; 3 *Eng. C. L.* 33; 5 *Esp. R.* 152; 1 *M. & S.* 737; 3 *Bac. Abr.* 593.

The opinion of the Court was delivered by

GIBSON, C. J.—The case of the plaintiffs below is poor in merits. It appears that they supplied a young spendthrift with goods which they call necessities, but which ill deserve the name. Their account mounts up to more than a thousand dollars, comprising charges for many articles which might be ranked with necessities when supplied in reason; but not at the rate of twelve coats, seventeen vests, and twenty-three pantaloons, in the space of fifteen months and twenty-one days; to say nothing of three Bowie knives, sixteen penknives, eight whips, ten whip-lashes, thirty-nine handkerchiefs, and five canes, with kid gloves, fur caps, chip hats, and fancy bag, to match. Such a bill makes one shudder. Yet the jury found for the plaintiffs almost their whole demand, including sums advanced for pocket-money, and to pay for

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keeping the minor's horses, which no one would be so hardy as to call necessities. How they could reconcile such a verdict to the dictates of conscience, I know not. They surely could not complacently look upon the ruin of their own sons, brought on by ministering to their appetites, and stimulating them with the means of gratification. Every father has a deeper stake in these matters than the public mind is accustomed to suppose; and it intimately concerns the cause of morality and virtue, that the rule of the common law on the subject be strictly enforced. The minor was at the critical time of life when habits are formed which make or mar the man—which fit him for a useful life, or send him to an untimely grave; and public policy demands that they who deal with such a customer, should do so at their peril. This enormous bill was run up at one store; and what other debts were contracted for supplies elsewhere, we know not; but let it not be imagined that the infant's transactions with other dealers did not concern the plaintiffs. "With a view to quantity, and quantity only," said Baron ALDERSON, in *Burghart v. Angerstein*, (6 Car. & P. 700), "you may look at the bills of the other tradesmen by whom the defendant was also supplied; for if another tradesman had supplied the defendant with ten coats, he would not then want any more, and any further supply would be unnecessary. If a minor is supplied, no matter from what quarter, with necessities suitable to his estate and degree, a tradesman cannot recover for any other supply made to the minor just after." And the reason for it is a plain one. The rule of law is, that no one may deal with a minor; the exception to it is, that a stranger may supply him with necessities proper for him, in default of supply by any one else; but his interference with what is properly the guardian's business must rest on an actual necessity, of which he must judge, in a measure, at his peril. In *Ford v. Fothergill*, (1 Esp. R. 211; S. C. Peake's N. P. C. 299), Lord KENYON ruled it to be incumbent on the tradesman, before trusting to an appearance of necessity, to inquire whether the minor is provided by his parent or friends. That case may be thought to have been shaken in *Dalton v. Gib*, (5 Bing. N. C. 198), in which it was held that inquiry is not a condition precedent to recovery where the goods seemed to be necessary from the outward appearance of the infant, though the mother was at hand and might have been questioned; but in *Brayshaw v. Eaton*, (*Id.* 231), this was explained to mean that, as such an inquiry is the tradesman's affair, being a prudential measure for his own information, the omission of it is not a ground of non-suit; but that the question is, on the fact put in issue by the pleadings, whether the supply was actually necessary. It is the tradesman's duty to know, therefore, not only that the supplies are unexceptionable in quantity and sort, but also that they are actually needed. When he assumes the business of the guardian for purposes of present relief, he is bound to execute it as a prudent

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guardian would, and, consequently, to make himself acquainted with the ward's necessities and circumstances. The credit which the negligence of the guardian gives to the ward, ceases as his necessities cease; and, as nothing further is requisite when these are relieved, the exception to the rule is at an end. In this case, the supply of articles which were proper in kind, was excessive in quantity. I impute no intentional wrong to the plaintiffs, for they dealt with the intestate, as others may have done, evidently supposing him to be *sui juris*; but I certainly do blame the jury for finding nearly the whole demand, after it had been conceded that he was an infant.

That the charge, though not palpably wrong in the abstract, tended to mislead in its application to the facts, is visible in the verdict it produced. The defendant went to the court for direction that the plaintiffs could not lawfully deal with the infant, even for necessities, unless the guardian had refused to furnish them; and had, for response, a direction that "the plaintiffs had no right to deal with the deceased, unless by the *permission*, express or implied, of the guardian; or unless the guardian had refused to furnish necessities for his ward." This very significant addition to the principle assumed in the prayer, was meant to indicate a liberty to deal by permission beyond the bounds of necessities, or it meant nothing. It indicated that an authority to deal with a minor in a way to charge him personally, emanates from his guardian's permission, which is paramount, or at least equal, to the authority so to deal with him, that emanates from his necessities. The jury would naturally so understand it. And this was predicated in reference to the question before them, whether the ward's estate could be subjected to payment for luxuries. They might readily understand, therefore, that the guardian's permission to run up this bill would charge the ward's estate with it, independently of its propriety. If that was not the drift of the direction, it is not easy to see why anything was said about permission at all. In a case of doubtful propriety, I can readily understand how the guardian's sanction, or that of a relative, might justify a supply beyond the limits of strict necessity, which a dealer might furnish *bonâ fide* on the credit of the ward; but though the guardian might subject himself to payment of a grossly improvident bill, by a permission amounting to an order, his connivance at an improper supply by a tradesman, would not subject the ward to payment of it. Indeed, it has been said (3 Wils. Bacon 595 in *marg*) to have been several times decided, that where credit has been given to the parent or guardian, the creditor has no recourse to the infant. The guardian is set over the ward for the very purpose of preventing him from making such a bill; and his desertion of his trust would not help the case of one who had dealt with the ward *malâ fide*. As, then, the plaintiffs were bound to know that the guardian abused his trust in allowing the infant to run

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up this bill, they can recover no more of it than was proper to relieve the ward's necessities. This notion that the guardian's permission might legitimate the demand, may have had a misguiding influence on the jury; for a passive acquaintance with the transaction which the law would presume from his duty to have an eye on the doings of the ward, would be a constructive permission; or it might be implied from the fact that he had left the ward to shift for himself.

Again. The defendant prayed direction, "that if the plaintiffs were justifiable in dealing with the ward, the bill is so exorbitant that the plaintiffs themselves could not have considered them (the goods) necessities; and that they are therefore not entitled to recover:" in answer to which, the court charged that "what are necessities, is a question of fact mixed with law. It is to be decided by the jury under the direction of the court, and depends on the estate, circumstances and pursuits of the minor. The jury will probably think this bill extravagant, and that the plaintiffs could not have supposed many of the items necessary: some of them, they must have known, were not necessary. The plaintiffs cannot recover for what were not necessities." Not a word in this, in response to the prayer for direction as to the effect of the plaintiffs' consciousness that the supply was extravagant; though consciousness would affect them with *mala fides*, and deprive them at once of whatever merit they might otherwise pretend to have from the guardian's implied sanction. The Judge said truly, that what are necessities, is a question mixed of fact and law; but he did not say, as he might and perhaps ought to have done, that an over-supply of goods otherwise proper, ceases to be a supply of necessities as to the excess. The jury were indeed left to say what were necessities; but rather as regards the sort than the quantity, in respect to which the effect of excess was overlooked throughout. Had it been properly impressed, the jury could not have found more than a fourth part of the bill. To them doubtless belongs the question of extravagance; but where the supply has been so grossly profuse as to shock the sense, it is the business of the Judge to say so as matter of law, and charge that there can be no recovery for more than was absolutely necessary.

Judgment reversed, and a *venire facias de novo* awarded.

Clark against Clark.

Arrears of alimony due at the death of the wife in the case of a divorce *a mensâ et thoro*, are not recoverable from the husband by the personal representatives of the wife. But if during the life of the wife the husband unjustly avoids the payment, by reason of which the wife contracts debts, and her representatives sue for the use of her creditors, then they may recover.

A husband is entitled to letters of administration upon his wife's estate; and if they issue to a third person, he will be a trustee for the husband; but in an action by him against the husband, the regularity of the letters of administration cannot be impeached.

ERROR to the Common Pleas of Washington county.

Joseph Henderson, administrator of Grace Clark, against Josiah Clark. Grace Clark, the plaintiff's intestate, charging her husband, Josiah Clark, the defendant, with adultery, obtained a divorce *a mensâ et thoro*, and the court decreed that he should pay her one dollar a week until the next term: at the next term the court made another decree for the payment of the same sum for another period: and, eventually, the court decreed the payment of the same sum until the parties should become reconciled. After the lapse of three years, Josiah Clark having left the State, a foreign attachment was issued, at the suit of Grace Clark, against him, in which she declared in debt upon the several decrees made in her favour. After the suit was brought, the plaintiff died, and her administrator was substituted.

The defendant appeared and pleaded specially:—

That the plaintiff ought not to have and maintain his action aforesaid because he saith that the said Joseph hath no right to administer on the estate of the said Grace, he the said Josiah having been lawfully married to the said Grace, in her lifetime, and no sentence of divorce from the bonds of matrimony having ever been decreed between the said Josiah and the said Grace, and he never having assented to the issuing of the same. He therefore prays judgment, &c.

And for further plea saith that no action can or ought to be maintained on the decree in the said plaintiff's declaration mentioned, as the same did not survive to the use of the administrators of the said Grace, &c. And therefore he prays judgment, &c.

And for further plea saith that the said plaintiff ought not to have and maintain his action aforesaid, as no action of debt or other action at law can be maintained on the decree or sentence in the said declaration mentioned. And therefore he prays judgment, &c.

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To these pleas the plaintiff demurred, and the defendant joined in the demurrer. And the court below (EWING, President) gave judgment for the plaintiff.

Alden and *Marsh*, for plaintiff in error, in support of the first plea, cited *Toll. Law of Ex'ors* 57; *Burns's Ec. Law* 278 a; 1 *P. Wms.* 378; *Com. Dig.*, tit. *Baron and Feme*; *Strange* 891. As to the third plea, 2 *Dall.* 123; 2 *Burns's Ec. Law* 505 a; 17 *Serg. & Rawle* 9; 1 *Whart.* 63; 15 *Mass.* 197; 4 *Mass.* 588; 13 *Mass.* 264.

M'Kennan, contra, cited 9 *Serg. & Rawle* 252; 6 *Cowen* 496; 4 *Mass.* 130; 15 *Mass.* 196; 1 *Whart.* 63; 7 *Simons* 22; *S. C.*, 9 *Con. En. Ch. R.* 460.

The opinion of the Court was delivered by

ROGERS, J. — A husband who survives his wife, by the Act of the 8th April 1833, is entitled to take her whole personal estate, and in England, to her property not reduced into possession, as her administrator. Even in this State, notwithstanding the Act cited, the proper mode of recovering her choses in action will be in the capacity of administrator. But although the husband may, yet he is not bound to take out letters, as he may waive the right to the administration in favour of a third person, who will be a trustee of the assets for the benefit of the husband. The letters of administration were regularly granted to the plaintiff; it is, therefore, incompetent, in this suit, to impeach their regularity. And this depends on principles which are so fully established, that it is only necessary to refer generally to the authorities which have been cited in the argument. But can a suit be sustained for arrears of alimony, at her death, by her executors against her surviving husband? On this point there is some uncertainty. Thus in *Stones v. Cooke*, (7 *Simons* 22), a bill was filed by the executors of the defendant's deceased wife for alimony, which the defendant had been ordered by a decree of the Ecclesiastical Court to pay to her. The defendant put in a general demurrer. Sir L. SHADWELL, V. C., after having consulted with the Ecclesiastical Court, said, that the better opinion seemed to be, that the Ecclesiastical Court would allow the wife's executors to enforce payment of the arrears of alimony against the husband. If that were so, a bill in chancery, the vice-chancellor observed, was unnecessary, as the principle on which the court grants a *ne exeat* against the husband, is that the Ecclesiastical Court has no power to compel him to give bail. But as it was not so clear that the Ecclesiastical Court would, in a case like the present, decree an account and payment of alimony, as to justify him in allowing the demurrer, it was overruled. But on appeal, Lord LYNCHURST, chancellor, allowed the demurrer, and said that the argument that the party would be without remedy because executors could not maintain a

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suit in the Ecclesiastical Court, operated against the bill, as showing that the claim must cease with the wife's death. He observed, that there was no instance of such a bill filed against a husband; nor did the authorities warrant it; and the non-interference of the Ecclesiastical Court did not found any jurisdiction in the Court of Chancery. 3 *Jurist* 1116, approved by Lord COTTINGHAM, *Stones v. Cooke*, (8 *Simons* 321, n.)

And this principle results from the relations of husband and wife. A sentence of divorce *a mensâ et thoro* does not so far destroy the relation of husband and wife as to make the latter a feme sole; such a sentence merely suspends, for a time, some of the obligations arising out of that relation. A woman divorced *a mensâ et thoro*, and living separate and apart from her husband, cannot be sued as a feme sole, unless in the known excepted cases of abjuration, exile, and the like, where the husband is considered as dead, and the woman as a widow. The same holds good where she is divorced *a vinculo*. *Marshall v. Rutton*, (8 *T. R.* 545); *Hyde v. Price*, (3 *Vez.* 343); *Lean v. Schutz*, (2 *Black.* 1195). Alimony is not considered the separate property of the wife, but it is that proportion of the husband's estate which the court allows her for her present subsistence and livelihood according to law, when they decree a separation from bed and board. In *Vander-gucht v. De Blaquiére*, (8 *Simons* 315), it was attempted to assimilate alimony to the separate use of a woman, but the court denied the similitude, for alimony is liable to be varied by the court according to the husband's circumstances. A married woman, divorced from her husband, and entitled to alimony under the sentence of the Ecclesiastical Court, accepted a bill of exchange for articles of dress supplied to her by the drawer, and made payable at her banker's, to whom her alimony was paid. It was held she did not thereby charge her alimony. The bill was filed by the husband of a milliner against a lady and her trustees named in a deed of separation between her and her husband, and it prayed an injunction to restrain certain sums from being paid to the wife, until the plaintiff was paid a bill of £225 due to her for millinery. An injunction having been granted, it was dissolved, and a distinction taken between her ~~separate~~ estate and alimony. The former she had a right to charge, but the latter she has not, because it is given for her support and maintenance from year to year. In case of a divorce *a mensâ et thoro*, she ought to apply her alimony to her support, as her occasions may require; and if those who know her condition, instead of requiring immediate payment, give credit to her, they cannot sue her. *Beard v. Webb*, (2 *Bos. & Pul.* 93); *Marshall v. Rutton*, (8 *T. R.* 545); *Murray v. Barlee*, (3 *M. & K.* 220).

As a divorce *a mensâ et thoro* does not destroy the relation of marriage, but merely suspends some of the obligations arising out of that relation, it follows that the right, as regards succession

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to property, is not impaired. Thus a wife, after a divorce on account of cruelty, is dowable of her husband's land. *Stowel's Case*, (Cro. Car. 463). So a husband is tenant by the curtesy of his wife's lands. The husband is also entitled to her personal property, and he may release a legacy given to his wife, notwithstanding a divorce. Thus a wife obtained a sentence of divorce on account of the husband's adultery; the wife sued in the spiritual court for a legacy given to her; in answer, the release of the husband after the divorce was pleaded, and the court held that inasmuch as the sentence did not avoid the marriage absolutely, but they remained husband and wife, the release of the husband was effectual. *Cro. Eliz.* 908; 1 *Salk.* 123. But it has been held that a husband, after a divorce, cannot release costs awarded to the wife in a suit of defamation. *Motteram v. Motteram*, (*Buls.* 264); *Chamberlaine v. Hewson*, (5 *Mod.* 70). The reason the release will not bar the wife, is, because the costs come in lieu of what she has spent out of her alimony, which is a separate maintenance, and not in the power of the husband. 8 *Bac. Ab., tit. "Baron and Feme"* 482. Thus it appears that the title to property, whether dower, curtesy or personal estate, is affected by a divorce according to the nature of the divorce; for if it be a dissolution of the marriage and then only, the rights consequent upon it will cease. But where the bond of matrimony is not dissolved, as in case of a divorce *a mensâ et thoro*, the rights of the parties, so far as regards succession to property, remain as before.

From this it would result, that the arrears of alimony belong to the husband; and it would seem to be against right to compel him to pay to another that which belongs to himself. And this may have been avoided by the husband, who might, upon a proper application, have the letters of administration set aside; but this he has not thought proper to do; and it cannot be done, as has been already said, collaterally. This case is peculiar in its circumstances, and upon equitable grounds only can a suit be sustained. In *Stones v. Cook*, (9 *Cond. E. C. R.* 460), the doubt was whether the Ecclesiastical Court could give a remedy, and if they could not, it seems to be conceded that a bill would lie by the executors of a married woman to recover arrears of alimony due at her death. Here the administrators sue for the benefit of the creditors of the wife, who will be without remedy unless this action can be sustained. After the sentence of the court decreeing alimony, the husband withdrew himself from the jurisdiction of the court, so that it became impossible, by his own act, to enforce the decree by attachment. It is true, that alimony is given to the wife for her support; and, unlike her separate estate, it is not chargeable for her debts, and that in ordinary cases persons trust her at their own peril; but what is a wife to do, when the husband obstinately refuses to pay, and withdraws himself from the jurisdiction of the court by abjuring the State? She has no pro-

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perty, except her alimony, and if that is not paid, she must contract debts, which debts must be paid by the husband, or out of the arrears of her alimony. He cannot escape from the consequences by his own improper act. Here the only remedy is by an attachment against the land of the husband; and of this remedy we will not deprive the creditors; nor would we have prevented the wife from a similar proceeding in her lifetime. If after payment of the debts anything should remain, the administrator will hold it for the use of the husband, on the principle before stated.

As to the technical difficulty, whether an action of debt lies for alimony decreed on a sentence of divorce, it seems to be settled in *Howard v. Howard*, (15 Mass. 196). The sum is ascertained by the decree of the court. It is certain; and this appears of record, in the nature of definitive decree. Besides, this is an equitable relief; and, as we have no Court of Chancery, the form of action is no barrier to the recovery.

Judgment affirmed.

Lusk against Garrett.

Under the provisions of the Law establishing the District Court of Mercer county, after a cause has been referred to arbitrators, an award made and appeal by the defendant, the plaintiff cannot sign judgment for want of an affidavit of defence.

ERROR to the District Court of Mercer county.

John P. Garrett against Loring Lusk. This was an action founded upon a note for the payment of \$434.91. On the same day the writ issued, the plaintiff entered a rule to have arbitrators chosen. They were afterwards chosen, and made an award for the amount of the plaintiff's claim, from which the defendant appealed and made the necessary affidavit required by law, and entered into recognizance, on the 23d August 1843. On the 11th September 1843, the plaintiff's attorney signed a judgment in the prothonotary's office against the defendant for want of an affidavit of defence.

Stephenson, for plaintiff in error, referred to the Act of 29th March 1839, sect. 7, *Purd. Dig.* 265; 4 *Binn.* 429; 3 *Serg. & Rawle* 253; 1 *Trou. & Halv* 233.

Pearson, contra.

The opinion of the Court was delivered by

HUSTON, J.—In this case we are of opinion the judgment

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signed in the prothonotary's office is not justified by the true construction of the several Acts of Assembly. The Act organizing a District Court, on which the plaintiff relies, is, as to the part material here, copied from the Act of 1835 creating the District Court in Philadelphia, in which the Arbitration Act was repealed in the Philadelphia district; and the special affidavit of defence required by that Act was intended to produce a judgment speedily, where there was no defence, without calling on the parties to choose arbitrators. In the district in question, the arbitration law is left in force, and yet the affidavit of defence is required. Now, this case was referred and arbitrators chosen, and a report made and filed, and an affidavit made that the appeal was not for delay, but because the defendant verily believed injustice had been done, and recognizance entered into and an appeal duly entered. After this, the plaintiff goes to the prothonotary's office, and signs a judgment for want of an affidavit of defence, and says he is within the letter of the law. But so he would have been, if the case was still pending before the arbitrators; and so he would have been, if the arbitrators had reported in favour of the defendant; and it would require some hardihood to say that, in either of those cases, the judgment could have been supported. We have two Acts of Assembly, each intended to enable a plaintiff to get judgment sooner than by common course of law. I incline to the opinion intimated by the present Chief Justice in 3 *Serg. & Rawle* 250, viz., that if a man proceeds under one of these till he is thrown back to the ordinary course of law, he cannot then go to and proceed under the other Act; but here there was in substance an affidavit of defence; and, where such is the case, the plaintiff cannot sign judgment in the prothonotary's office, but must take it by motion in court; so that either way the judgment is wrong. I would advise gentlemen of the bar to practise strictly, but not too technically, or to rely on verbal nicety of construction, so as to defeat the objects of the law or the purposes of justice. The other errors need not be noticed, but I may say the statement contains a copy of the note.

Judgment reversed, and the cause remanded to be proceeded in by the District Court.

Plummer *against* Neile.

A tenant in common of a tract of land devised to his co-tenant his estate, upon condition that he would convey to his daughter a certain part of the land. After the death of the testator, the devisees took possession and enjoyed for a long time their respective portions; but no conveyance was ever executed. *Held* to be a substantial compliance with the requisitions of the will, and that the demise was not forfeited by the omission to convey.

ERROR to the District Court of *Allegheny* county.

This was an action of ejectment by the heirs of Nathaniel Plummer deceased, against Eli Neile and others, for a tract of 390 acres of land. The whole case is fully stated in the opinion of the court.

M'Candless and *Miller*, for plaintiff in error, cited 5 *Rawle* 375; 3 *Maule & Selw.* 300; 2 *Vern.* 366; 2 *Watts & Serg.* 65; 4 *Serg. & Rawle* 373; 3 *Cowen* 58; 2 *Meriv.* 24; 18 *Vez.* 368; *Pow. on Devi.* 522; 21 *Law Lib.* 305.

Metcalf, *contra*, whom the court declined to hear.

The opinion of the court was delivered by

KENNEDY, J.—The land in dispute was held by Nathaniel Plummer the elder, the ancestor of the plaintiffs, in common with his son Nathaniel Plummer junior; that is, the whole tract was held by them as tenants in common. On the 14th day of August 1814, Nathaniel Plummer the elder made his last will and testament, whereby, *inter alia*, he bequeathed and devised as follows: "I do also give and devise to my daughter Hannah Fetterman 30 acres of land, lying at the south-west corner of the land on which I live, bounded, &c., to have and to hold the same to her, for and during her natural life; and after her death to her three sons, Washington, Plummer and George, to them and their heirs and assigns for ever as tenants in common. I do give and bequeath to my said daughter Hannah Fetterman \$500, to be paid to her by my son Nathaniel in one year after my death." And then, in a subsequent clause, the testator devises and directs as follows: "I do devise and direct my son Nathaniel Plummer jr, to convey to my said daughter Hannah Fetterman his undivided moiety of the 30 acres before mentioned for her life, and to her three children in fee after her decease. On the condition of his compliance with this request, I do devise to him, his heirs and assigns for ever, the remainder of the land whereon I now live, being the undivided

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moiety, to be held and enjoyed by him in fee-simple after the death of my wife, subject to the privilege of fruit given to my daughter Hannah." On the 10th of April 1818, the testator, by a codicil to his will, after reciting that in his will he had given to his daughter Hannah 30 acres of land on the north-west of his land whereon he then lived, during her natural life, and after her decease to her three sons in fee for ever, and likewise, in the same will, that he had given unto his said daughter Hannah \$500 to be paid to her in one year after his decease, by his son Nathaniel, proceeds as follows: "Now I do hereby declare, that in lieu of the said 30 acres of land, mentioned in said will, I give unto her and unto her said three sons after her decease, in like manner as therein mentioned, 10 acres of land lying in the south-east corner of my land, and joining lands with Andrew M'Farland, &c.; and likewise in lieu of the \$500, mentioned in said will, I have executed a deed of conveyance to my said daughter, and to her heirs and assigns for ever, for 5 acres and 11 perches of my land, adjoining the aforesaid 10 acres, which is to be considered as a full consideration for said \$500 as mentioned in said will." The residue of the land devised to Nathaniel the son, whereon the testator lived, is the same which is claimed to be recovered in this action by the plaintiffs as the heirs at law of the testator. They claim that the devise to the son has a condition precedent annexed to it, for which reason no estate under the devise did or could vest in him until he performed the condition; and it not appearing or having been shown that the condition ever was performed, the plaintiffs, consequently, are entitled to recover. The condition mentioned in the will is, that the son, who was tenant in common in fee with the testator in the 30 acres devised to Hannah, the daughter, should convey his undivided moiety in the 30 acres to Hannah, so that she should have and hold the entire 30 acres in severalty. And that notwithstanding the devise of the 30 acres to Hannah is revoked by the codicil in such a manner as to show clearly that the testator thereby intended that she should not take or have any interest in the same, yet the plaintiffs allege that by a fair construction of the codicil, the requisition on Nathaniel, her son, to convey his undivided moiety in the 30 acres to Hannah, must be considered as transferred and applied, by necessary implication, to the 10 acres thereby devised to Hannah in lieu of the 30 acres; and that Nathaniel, the son, having failed to convey his undivided moiety in the 10 acres to Hannah, the undivided moiety of the testator in the residue of the land on which he lived, never passed by the will to the son, but descended to and became the estate of the plaintiffs, as the heirs at law of the testator.

Now, whether the testator intended that Nathaniel, the son, should convey the 10 acres, by a formal deed, duly executed, to Hannah, instead of the 30 acres, is far from being clear. For, in truth, there was no occasion for such deed being executed, in order

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to effectuate the intention of the testator in regard to the 30 acres; because, without its being required and done, Nathaniel, the son, could not have claimed and taken the residue of the land, under the will, without relinquishing all his interest in the 30 acres to Hannah. He would not have been permitted to claim a benefit under the will without yielding to the wishes and intention of the testator, as manifested throughout the whole of it. He would have had a right to elect to take the estate devised to him in the will, or not, as he pleased; but if he elected to take it, he thereby, *ipso facto*, would have released all his right in and to the 30 acres, as completely as if he had executed the most formal deed that could have been devised and drawn for that purpose. That the law is so in this respect, was probably unknown to the testator when he made his will, and he therefore may have required his son to convey to Hannah his interest in the 30 acres; but it may be that he acquired a knowledge afterwards, before he made his codicil, that the execution of such a deed was unnecessary, and therefore deemed it unnecessary to repeat that it should be executed in regard to the 10 acres. Be this, however, as it may, we are entirely satisfied that, under the circumstances of this case, the plaintiffs have no right to the land in controversy. For, immediately upon the death of the testator, Nathaniel, the son, made his election to take the residue of the testator's land devised to him in the will, giving up and setting apart, at the same time, the whole entire 10 acres in severalty, as devised to Hannah. Hannah accordingly took possession of the 10 acres in severalty, which she has enjoyed ever since, a period of more than 21 years anterior to the commencement of this action; and Nathaniel, the son, in like manner took possession of the residue of the land, which he and those claiming under him have had and held ever since. It is plain that the only possible motive which the testator could have had for requiring his son to make a conveyance to his daughter Hannah, was, to make her secure in the right to enjoy the land in severalty devised by him to her. That she is as fully and completely invested with such right, as if a deed of conveyance for that purpose had been executed to her by her brother Nathaniel, is equally plain, and cannot now be doubted. That the testator intended his daughter Hannah should have the 10 acres beside what he had previously conveyed to her, is also perfectly certain and clear; but it is equally so, that he also intended that his son Nathaniel should have the residue of his land, and, indeed, that he should have it at all events; for in no event that might or should happen, has he given it over to any other. It is also clear that the objects, and in fact the only objects of his bounty, as to his land, have each obtained and gotten all that he intended or desired they should have, and that there is not the least shadow of ground for any one to complain against the other; and that it would be most inequitable and unjust to permit Hannah, the daughter, who

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is one of the plaintiffs, to hold the land conveyed and willed to her by her father, which, in reality, did belong in part to Nathaniel, the son, and to come in now and take from Nathaniel, or those claiming under him, that which the father gave him, and may very properly be considered as having been given by the father, for the purpose, among other considerations, of indemnifying Nathaniel for what he had given of his to Hannah. Besides, if a deed of conveyance from Nathaniel, the son, to Hannah, the daughter, were requisite in order to protect the defendants who stand in the shoes of Nathaniel, it would be presumed to have been made, as the learned Judge in the court below instructed the jury, after the parties severally had each taken possession, immediately upon the death of the testator, of their respective devises in conformity to the will, and continued to hold and enjoy the same, in the same manner as if a deed of conveyance had actually been made, for a period of 21 years and upwards.

Judgment affirmed.

M'Bride *against* M'Clelland.

A symbolical, constructive or temporary delivery of personal property is not sufficient to change the ownership as to creditors; there must be an actual delivery at the time of the transfer, and a continuing possession: otherwise the sale, although *bonâ fide*, as between the parties themselves, is fraudulent in law.

ERROR to the District Court of *Allegheny* county.

This was an action of trover and conversion, by John M'Clelland against David M'Bride. The facts of this case were dependent entirely upon parol testimony, which was voluminous and contradictory. The substance of them was, that Andrew S. Joy, being the tenant of the plaintiff, sold to him certain articles of personal property, consisting of a horse, two cows, some sheep, hogs, &c., in payment of his rent. The property was removed to a neighbouring house, by the plaintiff, for safe-keeping; and in the course of the same day, and a few days following, all the property got back again to the premises occupied by Andrew S. Joy, and there they were levied and sold by David M'Bride upon an execution against Joy. This action was then brought to recover their value.

The court below instructed the jury, that if the sale by Joy to M'Clelland was honest, and in pursuance of it the possession was changed and given to M'Clelland, and Joy afterwards obtained the possession again without the act or consent of M'Clelland, he was entitled to recover in this suit.

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M'Graw, for plaintiff in error, argued that the court should have instructed the jury that the facts in proof did not establish a delivery at all; that it was merely colourable and strong evidence of fraud. 10 *Serg. & Rawle* 424; 2 *Watts & Serg.* 150; 2 *Whart.* 307.

M'Candless, contra, argued that the whole case was matter of fact, and depended upon the weight the jury would give to the testimony; and that there was no legal fraud. 1 *Yeates* 529; 3 *Serg. & Rawle* 20; 10 *Serg. & Rawle* 84.

The opinion of the Court was delivered by

ROGERS, J.—The plaintiff claims title under a contract with Joy, his tenant, and the defendant under an execution against the same person, as whose property the goods were seized and sold, they being, at the time, in the actual possession of the former owner. To enable the plaintiff to recover, two things are necessary. He must prove a purchase of the articles from Joy, the former owner, and an actual *bonâ fide* delivery to the vendee; for, in order to make a transfer of personal property available against creditors or a subsequent assignee, it must be accompanied by a change of possession at the time, or within a reasonable time thereafter. The change of possession must be *bonâ fide*, not colourable—clear, unequivocal and exclusive. The rule is intended to prevent fraud, and avoid the danger to creditors by giving a man a false and delusive credit. After stating very clearly the reason of the rule, Mr Justice KENNEDY, in *Streeper v. Eckart*, (2 *Whart.* 307), holds this language: “Seeing, then, this is the object of the law in requiring that a change of the possession shall accompany a transfer of the right of property, how is it possible that a change merely for a single night or day can answer the purpose, and advertise the public of the change of ownership in the property?” And in *Young v. M'Clure*, (2 *Watts & Serg.* 147), a case very like, in all its circumstances, to the present, it is held that to constitute a valid assignment of personal property against an execution, there must be a delivery, accompanied and followed by a continuing possession in the assignee. And when the possession does not follow, as well as accompany a transfer, it is a fraud in law, without regard to the intent of the parties, and becomes a question of law. It is not sufficient that the assignor give to the assignee a delivery which may be symbolical or constructive, or a temporary delivery, and then take the articles back into his own possession and keep and use them just as before. This is not the possession in the assignee which the law requires. There must be not only a delivery of the thing to him at the time of the transfer, but a continuing possession, and that must be shown by the claimant.

These principles have a direct application to the case in hand. It appears from the evidence that Joy was the tenant of the plain-

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tiff, M'Clelland, and as a security, or in payment of a rent not then due, on a lease which did not commence until the 1st April thereafter, entered into a written agreement, dated 20th February 1843, which purports to be a sale of the property. But notwithstanding the writing, when this transaction is viewed in all its aspects, we are not without suspicion, disguise it as you may, that it was intended as nothing more than a security for the rent of the ensuing year. It was so understood by several of the witnesses, and it requires strong faith to believe otherwise. But granting it to be a sale, was the possession so changed as to vest the property in the vendee in the manner indicated by the cases cited, so as to exempt it from the execution of creditors. If it were, it is obvious that the creditors have but little security, and the rule itself will be wholly inoperative. Here the articles were at Byers's, the place of delivery, some forty minutes or more. The horses were not even unhitched, nor were the pigs even taken out of the wagon. Having remained the time mentioned, they were again returned to the possession of the former owner, who continued to use them as before the sale. It seems, that the cattle found their way back the same evening, driven, as some of the witnesses say, by Joy, the tenant. M'Clelland, it is true, went through the ridiculous farce of marking the sheep, (for what purpose it is not difficult to conjecture), went into the house to take his supper, and then all the property, notwithstanding the pretended sale and delivery, is permitted by Byers to go again into the possession of the former owner, where they remained until they were seized in execution. The sheep, although such pains were taken in marking them, were also returned, as they say, for safe-keeping, to Joy, under the pretext that Byers had no food for them. It must strike every person, as singular, that this was not thought of before the removal of the articles to his house; and it is equally strange, that food for a day or two could not be procured for seven sheep, particularly as there was a public-house about 40 rods from Byers's, the depository. It must also be remarked that the articles, viz. sheep, cows, horse, wagon and harness and pigs were absolutely necessary to carry on the farm; hence we may reasonably infer that M'Clelland was not anxious to see them when they passed by the door or room where he was comfortably seated. This, also, will account for the fact that we hear of no objection, on the part of M'Clelland, to the permission given by Byers to take back the articles to Joy, the tenant. It is impossible to account for the conduct of the parties, and especially Byers and M'Clelland, upon any rational principles, except on the natural supposition that it was perfectly understood by all of them to be nothing more than a security for a year's rent, commencing the 1st of April after the contract, and that the property was to be used by Joy as before. It is not said that M'Clelland has been guilty of a moral fraud. His motives may have been, and probably were, twofold; to secure

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to himself a tenant for the ensuing year, and as an act of humanity towards the wife of Joy, who could not well be removed from the premises. But although he may not be guilty of any moral wrong, yet we are of the opinion that it is a clear case of legal fraud, and that the court ought so to instruct the jury as a matter of law.

Judgment reversed, and a *venire de novo* awarded.

Miller *against* Pearce.

If one procure a deed of conveyance of land to be made to him upon the promise and assurance that he will hold it in trust for another, that trust may be established by the parol testimony of the grantor. And if the land be sold by the grantee, the *cestui que trust* may maintain an action against him to recover the price.

ERROR to the District Court of *Allegheny* county.

This was an action of *assumpsit*, brought by Thomas Pearce against James Miller. The plaintiff claimed \$700, with interest from the 7th May 1838, for so much money had and received.

Abraham Pearce, father of the plaintiff, some time previous to the 31st December 1833, owned a small tract of land containing about 40 acres, in Pine township, on which he resided, and on that day by a deed in which he was joined by his wife, duly executed and subsequently acknowledged and recorded, he conveyed the tract to the defendant for the consideration in the deed of \$430. At the time of the conveyance Abraham was indebted to sundry individuals to the amount of about \$275; one debt amounting to about \$30. One of his horses had been levied in execution, and he was in hourly expectation that other executions, to the amount of about \$130, would be levied upon the small tract on which he resided. He was possessed of real property other than the small tract, which was estimated as worth \$1000 or \$1200, and personally subject to execution, worth perhaps \$100 more. During the existence of this state of embarrassment, Abraham, having consulted the defendant, was advised by him to convey the tract in controversy to him, as the best means of saving it from the grasp of his creditors, and compelling them to resort to his other tract; and, in pursuance of such advice reiterated both to him and his wife, he consented to make a voluntary deed to the defendant of the 40 acre tract; and the defendant, as an inducement to persuade him and his wife to execute the deed, declared that he would hold the tract in trust for his son, the plaintiff, and that he would con-

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vey it to him when he came of age, or that if he sold it, he would pay him over the purchase money on his arriving at the age of 21 years. Under this inducement (no consideration in fact having passed between the grantor and grantee) the deed referred to was executed. The defendant afterwards sold the land; and although he accounted with the plaintiff's father for the rents before the sale, he refused to account for the purchase money, the whole of which, it was admitted, he had received.

To prove all the facts as contained in the foregoing statement, the plaintiff offered Abraham Pearce as a witness.

The defendant objected for the following reasons:—

1. That it is an attempt to prove a sale of land rendered void by the statute of 13 Eliz. cap. 5.

2. That the witness offered is the grantor in an absolute deed, which contains a covenant of general warranty duly acknowledged, and is therefore not competent to invalidate it.

3. That the witness being bound by the warranty, is incompetent to testify for his son until he be released.

4. That it is not competent to prove by the witness a consideration different from that contained in the deed.

5. That the plaintiff cannot allege and prove a fraud on the part of his father, and predicate his right to recover in this suit upon it.

The court overruled the objections and sealed a bill of exception.

SHALER (President) was of opinion that there was no legal difficulty in the way of the plaintiff's recovery; and if the jury believed the facts as alleged by them, their verdict should be in his favour.

Woods, for plaintiff in error, cited 2 *Black. Com.* 295; 11 *Serg. & Rawle* 164; 2 *Watts* 187; 1 *Binn.* 519; 4 *Whart.* 519; 15 *Mass.* 207; 9 *Watts* 461; 1 *Chit. on Con.* 34; 2 *Black. Com.* 442; 5 *Serg. & Rawle* 425; 9 *Watts* 42; 10 *Watts* 204; 7 *Watts* 434; 3 *P. R.* 94; 3 *Whart.* 355; 4 *Yeates* 280.

Gilmore, contra, cited 1 *Dall.* 447; 3 *Binn.* 302.

The opinion of the Court was delivered by

HUSTON, J.—The defendant here was the plaintiff below, and made out the following case. In the autumn of 1833 Abraham Pearce and his wife owned the lot of land in question, on which were the buildings in which he lived and about 30 acres cleared, with fruit-trees, &c. The whole lot contained 43 acres. He also owned a tract at some miles distant, containing 300 acres, on which were some small improvements. The value of this last was put, by different witnesses, at from \$1000 to \$1500. A constable had levied on one of his horses for about \$30, and removed him to Miller's, who lived near and kept a tavern. A. Pearce went to Miller's to borrow the money to pay that debt. Miller proposed

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to him that it would be best to convey the small tract on which Pearce lived, to him, and stated to him: "You owe M'Kinney \$80, and Burns \$50, and Frederick Magee has bought those two debts, and wants your little place, and has bragged that he would levy on it and buy it from the sheriff." After some conversation, Miller said: "Sell it to me, and make a good deed, and when Thomas comes of age I will convey it to him. If you can't pay your debts, let them take the new place." (Thomas was an only child, then about sixteen years old, and the party to this suit.) This was agreed to. Pearce went home and stated this to his wife, who would not agree. He told Miller this, who went to Pearce's house and persuaded Mrs Pearce to agree; but, on reflection, she again refused. Miller went to her again. To induce her, he promised that he would never reconvey to her husband, but keep it till her son was of age, and convey it to him, or, if sold, give him the money. This occurred again; and, after the deed was drawn, and Pearce and wife at the magistrate's to execute it, she again hesitated, and the same promise was again solemnly repeated on his honour and honesty as a man. The deed was made. Pearce was paid \$30, and nothing more; and no note or bond given. The price in the deed was \$430. Pearce, after leaving the justice, returned the \$30, and Miller went and paid off the execution and took a receipt. Pearce worked for him to the amount, and Miller gave him up the receipt. Miller leased the land on the shares, and Pearce got the grain; when he leased it for money, that went to Pearce. There was evidence that Pearce was an imprudent and intemperate man. What seems conclusive, as to this fact, is, that to induce his wife to sign the deed, Miller had to promise, and did promise, never to reconvey to Pearce, but to keep it for the son, when he came of age; which shows that Miller, the nearest tavern-keeper, and his wife, the two persons who knew him best, thought him incapable or unfit to be trusted with property. This is the outline of the evidence. Miller gave no proof that before or after he paid any money to Pearce, or any debts except the \$30 to redeem the horse. Pearce's father had left a legacy to Thomas, the plaintiff, and Pearce was appointed his guardian, and got that. A brother died unmarried, and he was entitled to a share of his property; and with these he paid off all his debts. In 1836 Miller sold the land in question for \$700; and since that Pearce got nothing except some oats from the place. Thomas Pearce was twenty-one years old in 1840, and in that year brought this suit. Abraham Pearce and his wife were offered as witnesses; objected to, but received. The details of the transaction were principally proved by them; though, as the Judge observed, it was much corroborated by other witnesses, and by the rents going to them, and by no shadow of proof that Miller before or after the deed paid any money to Pearce or for him.

The Judge submitted the whole evidence to the jury. He cited

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Posten v. Posten, (4 Whart. 40); *Chambers v. Spencer*, (5 Watts 410), that a voluntary deed of part of a man's land was not fraudulent and void if he retained other property sufficient beyond a doubt to pay his debts. Here he referred to the evidence, uncontradicted, as to the amount of personal estate being about \$180, and real about \$1000. As to the admission of the witnesses, he relied on *Thompson v. White*, (1 Dall. 424); a case much resembling the present in all its parts. He said: "you should require the most satisfactory evidence, coming, as in this case it does, from the grantors, and making out a trust for their son. A plaintiff is bound to make out a strong case indeed, when he attempts to give, as it were, a new existence to a deed, and change its tenor in his favour;" and he referred to the testimony and facts of the case. In answer to a question, he said; "if the testimony is believed, the plaintiff may support this action of *assumpsit*."

The errors insisted on here were the admission of the testimony, and saying, if the jury believed the testimony, it made such a case of fraud and trust as took the case out of the statute of frauds and perjuries. The cases cited and relied on by the plaintiff in error all differed from this in the fact that the confidence reposed, and the contract itself, were not occasioned by the act and solicitation of the party charged. The case of *Thompson v. White*, (1 Dall. 424), was proved by the grantors in the deed. The deed was made in that form, and executed on the most solemn assurance of the grantee, that by deed or will he would carry out and effect the trusts intended and confided to him. In *Sheriff v. Neal*, (6 Watts 540), Judge KENNEDY, in delivering the opinion of this Court, says: "equity will not permit one to hold a benefit which he has derived through the fraud even of another, and much less will it do so if he has acquired it by means of his own fraud. This principle seems not only to be just, and to commend itself strongly to the moral sense, from the bare statement of it, but it has been acted upon and made the foundation of a series of decisions;" and he then cites cases, beginning with *Precedents in Chancery*, p. 3, and ending with 1 *Rus. & Myln.* 53, and sundry cases in our own reports; for which I refer to that case. Let it be understood, we do not speak of a case of a fraudulent deed, which is the contrivance and act of the grantor, but of one procured by the solicitation of the grantee; one never thought of, and which, probably, never would have been thought of by the grantor, and, in this case, obtained from a person, by the admission of the grantee, not fit to be trusted with the title to property, either from original incapacity or from intemperate habits.

The Judge of the District Court distinctly told the jury, that if Pearce contrived and executed this business, it was one thing; if Miller first proposed it, and persisted in soliciting the conveyance; if it was throughout, up to the execution of the deed, contrived and procured to be done at the persevering solicitation of Miller, pre-

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tending to be, and believed to be a friend, it was a different thing; and if the jury believed that this was made out by the testimony, the plaintiff might, and ought to recover.

Considering this deed as a voluntary conveyance for his son by a person indebted, it is not void on that account. He had property beside this, equal, at the lowest estimate of its value, beyond four times his debts. In *Posten v. Posten*, (4 Whart. 40), SERGEANT, Justice, in delivering the opinion of this Court, says; the rule that a conveyance is not void simply because a man is indebted, has uniformly been held not to be law in Pennsylvania. It is good if he still has property, which, in the common course of dealing, is amply sufficient to secure his creditors; and cites several cases, to which add *Chambers v. Spencer*, (5 Watts 410); and this doctrine is now distinctly recognised as law in England; see 4 East 1, which is cited with approbation in 2 Johns. Ch. 308.

Judgment affirmed.

Monongahela Navigation Company against Coons.

The license allowed by the Statute of 1803 to the owners of lands adjoining navigable streams declared by law to be highways, to erect dams in them for mills or other water-works, provided they do not injure the navigation or prevent the fish from passing, is not indefeasible, but subordinate to the right of the Commonwealth.

The Legislature may constitutionally incorporate a company to make a lock and slackwater navigation without requiring it to make compensation for consequential damage to private property in the execution of the work: held, therefore, that the Monongahela Navigation Company, incorporated to make such a navigation from Pittsburgh to the line between Pennsylvania and Virginia, by dams and locks in the Monongahela river, was not liable in an action on the case, for obstructing the water in the Youghiogeny river by a dam in the Monongahela, to the injury of the plaintiffs' mill.

THIS was an action on the case in the District Court of Allegheny county, brought by Adam Coons and David Coons against the Monongahela Navigation Company, for obstructing the water in the Youghiogeny river and injuring the plaintiffs' mill. The defendant is an incorporated company, and authorized by its charter to erect dams in the Monongahela river for the purpose of a lock and slackwater navigation between Pittsburgh and the Virginia State-line. One of these dams obstructed the water in the Youghiogeny, to the injury of the plaintiffs' mill, at the distance of five or six miles from its confluence. The only provision

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for compensation of damage in the act of incorporation, is contained in the 8th section, and relates exclusively to injuries done by entering on shore lands, and taking away the rocks, stones, earth and gravel. The 16th section originally provided that nothing contained in the charter should "impair any right, privilege or legal claim, which may have been granted to any individuals by any Act of Assembly heretofore passed for erecting mill-dams in said river" (the Monongahela); but the owners were required to make their dams links of the chain of works, and authorized to demand a proportionate part of the tolls. There was no saving of the rights pertaining to the owners of mill-dams in the tributary streams; and this 16th section had been repealed. There was, therefore, no provision for consequential injuries of any sort.

By the statute of 1803 it is enacted that persons owning the shores of navigable rivers declared by law to be highways, may erect dams in them for mills or other water-works, "provided that the said person or persons, in erecting the said dams or in keeping them in repair, shall not obstruct or impede the navigation of said streams, or prevent the fish from passing up the same." The plaintiffs' mill-dam was constructed in conformity to this proviso; and it was urged that the privilege, requiring, as it did, an expenditure of labour and money in permanent erections for the enjoyment of it, was founded on a contract which no subsequent act of legislation could impair; and that the constitutional power of the State was incompetent to exempt its agent from the payment of consequential damages for an injury done to private property, without compensation made or security for it tendered. The court below being of that opinion, there was a verdict and judgment for the plaintiffs.

Williams, with whom was *Williamson*, for plaintiff in error.

The first question is whether the Youghiogeny is a navigable public river? By the common law or custom of Pennsylvania, differing in this respect from the common law of England, but corresponding substantially with the doctrine of the civil law, which regards all rivers, where the flow of water is perennial, as belonging wholly to the public, (*Inst.* 2, 1, 2, *Dig.* 43, *tit.* 12, 13, 14, 15), the navigability or public character of a river or other stream of water depends, not on the flux and reflux of the tide, but on its capacity for public use as a commercial highway; *Carson v. Blazer*, (2 *Binn.* 475); *Shrunk v. Schuylkill Navigation Company*, (14 *Serg. & Rawle* 79); and on this ground all our "principal" rivers, among which the Youghiogeny is expressly included by Chief Justice TILGHMAN, in his enumeration of the rivers in the case last cited, have been so classified and recognised by our courts. The uniform solicitude evinced on this subject by the Legislature from the earliest period of our colonial history, is evidence of a common understanding entirely in harmony with the

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doctrine settled in the above cases. The Act of 1700, "prohibiting the erection of weirs;" (1 *St. Laws* 21); the Act of 14th August 1725, interdicting the construction of bridges; (1 *St. Laws* 168); the Act of 9th March 1771, "declaring the Susquehanna a public highway;" (1 *Sm. Laws* 324); and other Acts cited by BRACKENRIDGE, J., in *Carson v. Bluzer*, show the extent of the public claim over the waters of this State. The language of these Acts, moreover, proves that this claim was not limited by the quality of the vessels actually employed, or by the natural condition of the channel. It extended even to canoes, and kept always in view the capabilities as well as the existing uses of the stream. It was enough for the Legislature that it could be made navigable.

The magnitude and capabilities of the Youghiogeny river for the purposes of commerce, during a portion of the year at least, together with the fact that the inhabitants of a neighbouring State, from which it is derived, have always enjoyed the right of free passage upon its waters, would seem to entitle it to the denomination of a public navigable river within the meaning of our common law. But the Legislature of this State have already settled this question. By an Act of the 13th April 1782, (2 *Sm. Laws* 43), in accordance with the policy already indicated, and in affirmance only, as it is believed, of the common law, they have expressly declared the Youghiogeny river a public highway as far up as it had been or could be made navigable for rafts, boats and canoes. And that they have since uniformly regarded and treated it as such, is evinced by the passage of divers Acts establishing ferries, authorizing the construction of dams, (under certain important limitations as to the right of passage), and making appropriations for its improvement. Act of 11th March 1784, authorizing John Sumrall to establish a ferry; Acts of 27th March 1795; 26th February 1796; 22d March 1803, and 2d April 1822, authorizing the erection of dams; and the Act of 10th April 1792, "for improving navigable waters."

A correspondent understanding, on the part of the profession, also, is established by the fact that in the case of *Chambers v. Furry*, (1 *Yeates* 167), decided as early as 1792, the Act above referred to, authorizing John Sumrall to establish a ferry, was relied on as a constructive legislative denial of the right there asserted, of landing upon the freehold of another on the bank of a navigable river.

If, then, the Youghiogeny river be a navigable public highway, either at common law or under the statutes of this Commonwealth, the plaintiffs' dam is a public nuisance, and abateable as such, unless erected under a license from the sovereign, and not interfering with the public right of way. It is a well-settled principle of public law, that all navigable rivers belong to the sovereign, and no individual has a right to obstruct them. 10 *Mass.* 70. They claim, however, a right to erect and maintain their dam under the

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authority of the general Acts of 22d March 1803, and 2d April 1822, "authorizing owners of lands adjoining any navigable stream of water declared by law a public highway, to erect and maintain dams adjoining their own lands, and also to lead off thereby so much of the water as might be necessary for their mills or other water-works; provided that in erecting the said dams they should not obstruct or impede the navigation," &c. This right of erecting dams and diverting the water for specific purposes, the defendants have not disputed, nor have they interfered in any way therewith.

But the plaintiffs insist further, and they have so declared, that they are entitled to the natural flow of the stream or the water-power, which the defendants, an incorporated company, acting within the authority of their charter, have obstructed by their erections; and this is the gist of their complaint. Have they any such right under the Act of Assembly authorizing the construction and maintenance of their dam? If they have, they must show it. I maintain that they have not; because, 1, it is not in their grant; and 2, if it were, it was not competent to the Legislature to bestow it. The grant is of a privilege to land-owners to erect and maintain dams provided they do not obstruct or impede the navigation. It contains nothing in relation to the water-power; and neither that nor the soil of a navigable river was ever intended to be given away by the Legislature. *Carson v. Blazer*; *Shrunk v. Schuylkill Nav. Co.*; *Commonwealth v. Fisher*, (1 Penn. R. 467); *Ueberoth v. Lehigh Nav. Co.*, (7 Haz. Reg. 292).

If a right to the water-power, therefore, passes under this grant, it must be by mere implication. But such grants are to be construed strictly; because, 1, they are by the sovereign; 2, they are in derogation of common right; and, 3, they are without consideration, being matter of pure donation flowing from the bounty of the Commonwealth. "A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. But the King's grant shall not enure to any other intent than that which is precisely expressed." It shall rather fail of effect. 2 *Black. Com.* 347-8. The same rule of construction has been vindicated by Sir William Scott, (Lord Stowell), in 5 *Rob. Adm. R.* 182, as founded in wise policy, "because grants from the crown are made by a trustee for the benefit of the public, and no alienation should be presumed that was not clearly and indisputably expressed." It has, moreover, been solemnly recognised in numerous cases in this country, and the two last-mentioned considerations concurring here, render its application clear and irresistible in the present case. *Providence Bank v. Billings*, (4 Pet. 514); *Charles River Bridge v. Warren Bridge Co.*, (11 Pet. 420).

But admitting that such a grant of the water-power may be implied, another and stronger and more alarming implication—that of an absolute surrender of the public right in perpetuity—

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must be made, in order to enable the plaintiffs to maintain their action against an incorporated company, who, according to the principle of *M'Clenachan v. Curwin*, (3 Yeates 373; 6 Binn. 514), are to be regarded as the agents of the Commonwealth for the improvement of the navigation of the Monongahela river. But if the rule were otherwise than as before stated, is such a construction necessary to render the grant available according to its terms? Clearly not; because those terms may be fulfilled by giving to it the effect of a temporary license to obstruct the waters of a navigable river, without being subjected to the penalties of nuisance, but subordinate to the public right at the pleasure of the Legislature, whenever it shall think fit to exercise its sovereign power, and to discharge its public duty of improving the navigation of the river; while under any other construction, the proviso not to impede the navigation would be a nullity. The plaintiffs' dam is an impediment now, if it is to be permitted to arrest or interfere with the projected improvement of the navigation. Would such a construction be reasonable?

The grant is without consideration. The plaintiffs, without any large outlay, have enjoyed the privilege for thirty years, and it has been worth to them, according to their own showing, about \$500 a year. It is confessedly a privilege of great value. If, therefore, the Legislature had intended to part with it for ever, is it reasonable to suppose that they would have parted with it for nothing, and subjected themselves to the obligation of re-purchasing it again, at some not very distant day, from their own voluntary donee, for the purpose of re-converting the river to its original public destination, at an expense of many thousands of dollars? They never made any distinction, in price, between the lands on the banks of navigable rivers, and any other portion of the public domain, and they have therefore received nothing, either directly or indirectly, in return for this grant. The rule of construction, already referred to, in cases of public grants without consideration, applies here with augmented force, and is entirely consonant with the principles of right reason. Any other rule would work injustice to the donors, and be anything but reasonable.

This view of the case is moreover fortified by the absence of all words of limitation in the grant. There is nothing to indicate any determinate estate in the grantees. The right, if any, is a mere easement, and not an interest. Perhaps it might properly be denominated a franchise or liberty, which is defined to be "a royal privilege or branch of the King's prerogative subsisting in the hands of a subject." At all events, it is but an incorporeal property appurtenant to lands, or annexed to the ownership thereof, which lies only in grant, and not in livery, and one, moreover, which could not even be sustained by a prescription. When the Legislature intend a conveyance of the fee, they never fail to use the appropriate words. The omission in the present instance is

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readily accounted for, and is only to be accounted for by the fact that there was no consideration involved, and it was not their design to part with so valuable a property for nothing. That they never intended such a grant, is further evident from the fact that they never in any other instance parted with their right to the water of a navigable river; *Carson v. Blazer*; *Shrunk v. Schuylkill Nav. Co.*; and that in the present case they have provided no indemnity for mill-owners, either upon the Youghiogeny, or Monongahela rivers, but have directed them to alter their dams at their own expense, upon the latter stream, under the penalty of an absolute forfeiture of their rights.

But if such a grant as that claimed by the plaintiffs could reasonably be inferred from the Acts of Assembly, under ordinary circumstances, and in violation of the rules already referred to, on the ground of a probable intent on the part of the Legislature to make it, there is another rule of interpretation on this subject, settled by the highest judicial authority in this country, which must be regarded as conclusive against the right claimed by the plaintiffs in this action. The Supreme Court of the United States has more than once decided, that in a grant from a State to a citizen, no surrender of any one attribute of sovereignty which is lodged in the sovereign for the common benefit of the people, shall ever be implied. *Providence Bank v. Billings*; *Charles River Bridge v. Warren Bridge Co.* The former case was a question in relation to the taxing power; but in the latter, which was the case of a public highway, the court say distinctly, that they wish it to be understood as applying to all cases wherein the surrender of any power which is vested in, and exercisable by the sovereign for the common good, may be claimed by the citizen; and they put our very case, substantially, by way of illustration. It is worthy of remark, also, that Justice Story, in dissenting from the opinion of the court in that case, rests his objections on the fact that there was an adequate consideration for the grant, and admits, that if it had been otherwise, the rule would have been indisputable. Under the authority of that case, the right claimed here could have been maintained only on the footing of an express grant of the water-power, and an express contract on the part of the State not to obstruct or impair it by any future improvements in the navigation.

But supposing such a contract to exist, there is another very material question to be answered; and that is, whether it was competent to the Legislature to make it? It is admitted that there are certain rights belonging to the State which may be granted away at the discretion of the Legislature. There are others, however, which are essentially public, which have been enumerated by the feudists among the *res sacræ*, but are better known by the denomination of *jura publica* or *jura communia*, as contradistinguished from the rights of the crown. These, and such

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things as are materially related to them, are unalienable. The rule laid down by BRACTON, is, that "things which relate peculiarly to the public good (*et quæ faciunt ipsam coronam, et communem utilitatem respiciunt*) cannot be given, sold or transferred by the King to another person, or separated from the crown." The same rule was admitted by the feudal law. "*Res ad coronam regis, vel utilitatem publicam pertinentes inter sacras numerantur; neque recte in feudum dantur, et quasi sacræ dicuntur.*" Schultes on Aquatic Rights, (24 Law Lib. 4); Bracton, liber 2, cap. 5; Craig Jus. Feud. liber 1. "The rights, or private prerogatives of the crown, on the other hand, being of a secondary nature, and not necessarily dependent on the public rights, or affecting the common utility of the realm, were allowed to be transferred." (*Ibid.* 5.) "The subject hath in navigable streams an interest of common right, which cannot be abridged, diminished or counteracted even by a royal grant." (*Ibid.* 26.) And again: "The right of property in the soil (of a navigable river) belongs to, and is transferable by the King, though this is subject to the *jus publicum* of the subject when they interfere with each other." (*Ibid.* 41, 42.) "Every public river or stream is *alta regia via*." (*Ibid.* 50.) Therefore "the right of fishery never was vested in the crown exclusively. As a public right belonging to the people, it *primâ facie* vests in the crown; but such investment does not diminish the right or counteract its operation." (*Ibid.*)

The same distinction is fully recognised by the attorney and solicitor-generals *arguendo* in 2 Anstruther's R. 603. They say: "the *primâ facie* right of the crown to all ports and arms of the sea, and to the soil thereof, is clearly established. The nature of that right is explained by Lord HALE, in his *De Jure Maris*, and *De Portibus Maris*. It is there shown (p. 12,) that the King has the soil of the sea-coast and havens, and is entitled to the profits thereof as a *jus privatum*; and, so far as it is considered in that light merely, he may grant it away. But he has also (pp. 81, 83, 88, 89,) another right in the arms of the sea—the right of free passage for all his subjects and others, and of having all havens and branches of the sea preserved from nuisances for that purpose. This is a right similar to the King's property in a highway—a mere *jus publicum*—vested in the King for the use of the subject. This, by its nature, is unalienable, and shall prevail against any claim set up against it. *Hale de Jure Maris* 12; *De Portibus Maris* 85."

It may be remarked, also, that by the common law, where the navigability of a river is ascertained by the ebb and flow of the tide, even above that point, and in the case of a purely fresh-water stream, where the riparian owners are unquestionably entitled *ad medium filum aquæ*, the *jus publicum* has been uniformly recognised to exist. 3 Caines 315, 319; 10 Johns. 237; 2 Conn. 481. On this point Chancellor KENT says: "the common law, while it

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acknowledged and protected the right of the owners of the adjacent land to the soil and water of the river, rendered that right subordinate to the public convenience; and all erections and impediments made by the owners to the free use of the river as a highway for boats and rafts, are deemed nuisances." 3 *Com.* 411. It would be strange indeed if the public interests were not as well protected in this country. That the people at large are themselves the sovereigns, is no sufficient answer to their just claims in this respect. It is not admitted that there are no restraints upon the law-making power, except such as are to be found in our several constitutions; and if a royal grant be void in England, because it is against common right, there is no reason why the same protection should not be extended to us here against the usurpations of our own temporary representatives. The right to the soil and water of a navigable river is vested in the Commonwealth merely as the representative of the people, of whose interests they are the guardians. It is, however, but a trust for the common use, and any appropriation of it to an individual for his own private emolument, would be such a misapplication of the trust estate as would enable the real owner (the public) to follow it into the hands of the fraudulent grantee.

The Supreme Court of this State has in fact affirmed the sacredness of the *jus publicum* even in the case of a small incorporated town. In *Barter v. The Commonwealth*, (3 *P. R.* 253), where an individual claimed a right to use a well of long standing upon a public street, it was decided that the government of every town has an indisputable right to improve the streets for public purposes; that the title of the corporation to the soil for such purposes is paramount and exclusive; and that no private occupancy, even by permission, can vest a title inconsistent therewith. Such occupancy is always subordinate to the public franchise. If this be law as to a petty municipal corporation, how much more appropriate to the sovereign power, the State itself, in the case of a navigable public river! It is urged, however, that the charter of the defendants, and the authority to collect tolls from those navigating the river, would be itself, under this doctrine, such an abridgement of the public right, as would avoid their own grant. The reply is obvious. The grant of the defendants is of a privilege entirely consistent with, and in furtherance of the public user of the stream; and *M'Clenachan v. Curwin* decides that the exaction of a toll is no abridgement of the public right, but merely a reasonable tax levied by the government to defray the expenses of an improvement made for the common benefit of the citizens.

But suppose the plaintiff's right to be established; the next inquiry will be, whether they can maintain this action? The action is in case for a nuisance occasioned by the construction of the defendants' dam. It is not pretended that the defendants have exceeded their authority, that they have been guilty of negligence

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in the execution of their work, or that they have wantonly injured the plaintiffs. How, then, can this action be maintained? The defendants are not certainly suable in tort for doing what the law expressly allows, unless they have done it so negligently or unskillfully as unnecessarily to damnify the plaintiffs. It was even questionable for a long time whether an action in tort would lie against a corporation at all. It has been decided, however, in this State, that it may be maintained against them, provided it be averred and proved that they have exercised their powers wrongfully and injuriously to the plaintiff. (4 *Serg. & Rawle* 6.) If the defendants had pleaded specially their license, there could have been but one reply; and that would be, that the Act under which they justified was unconstitutional. If, however, the Law was unconstitutional, and the defendants were acting without authority, they were liable individually. To bring an action against them as a corporation, and at the same time to charge them with a nuisance for acting without warrant, would be to affirm their charter and deny their authority in the same breath. This view of the case is very strongly enforced in the *Law Magazine for April 1843*, No. 1—article, “*Consequential damages.*” If, on the other hand, the law was constitutional, it would undoubtedly furnish a complete justification to the defendants. This principle is settled in 4 *T. R.* 790; *Callender v. Marsh*, (1 *Pick.* 418).

But is the law unconstitutional? If it be so, it must be on the ground, either that it impairs the obligation of a contract, or that it takes private property for public use without making compensation to the owner. But there is no contract in the case. There is no grant of the water-power, and no agreement on the part of the State not to make an improvement in the navigation which might have the effect of neutralizing that power; and if there had been, it was without consideration, and therefore void. If, however, there be a contract, the law incorporating the defendants does not act directly upon the subject of the grant itself, and does not therefore impair its obligation. 3 *Pet.* 289; 2 *Pet.* 380. An Act of a State Legislature may, under this limitation, divest vested rights, without interfering with the constitutional interdict; and if any injury is done, it is for them to furnish the remedy. *Ibid.*

Does it then “take private property” for public use? It does not certainly “take” either the dam or the mill of the plaintiffs. If they have a right to the former, it is not even disturbed. There is no direct invasion—no “taking” of property, at all events—within the meaning of the Constitution. The damage, if any, is merely incidental or consequential; it is only *damnum absque injuria*; and for this, however much they may be injured, they cannot maintain their action. 6 *Whart.* 45. Chief Justice GIBSON, in delivering the opinion of the court in this case, says that “the constitutional prohibition extends not to matters of mere annoyance.” “The injury complained of is not direct, but conse-

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quential." But though the State usually compensated consequential damage, it was of favour, and not of right. Nor did she always make such compensation. In one well-known instance, she destroyed a ferry by cutting off access to the shore, without provision for the sufferer; and in *The Commonwealth v. Richter*, (1 P. R. 467), damages were unavailingly claimed from her for flooding a spring by a dam. The word "taking," in the Constitution, is interpreted to mean taking the property altogether—not a consequential injury to it, which is no taking at all. For compensation for the latter, the citizen must depend on the forecast and justice of the Legislature." This opinion seems to be conclusive on the point. If a ferry may be cut off without compensation, (and it has been decided that a fording may, *Zimmerman v. Union Canal Co.*, 1 *Watts & Serg.* 346), there is no conceivable reason why the same rule should not extend to the case of a dam.

The like doctrine has been settled by the highest authority in Massachusetts, Connecticut and New York. In the first, it has been held that an action would not lie against the surveyor of the highways for digging down or filling up a public street, whereby the property of an individual was injured, (*Callender v. Marsh*); and the same point is said to have been lately ruled in this county by the judge before whom the cause was tried, in the case of the Hand Street Bridge Co. of Pittsburgh. In Connecticut and New York, it has been decided that the proprietors of lands on the banks of a navigable river were not entitled to recover in a suit against either an incorporated company, or a State officer authorized to improve the navigation; although, in the former case, the lands of an individual were gradually undermined and washed away, and in the latter a valuable wharf was destroyed by rendering it inaccessible to shipping. These, too, were moreover cases of undoubted private ownership, founded upon valuable consideration; but the court held in both that the proprietors of lands in such situations took them subject to such contingencies: that the injury done was not such a "taking" as is provided for in the Constitution; and that, as the defendants acted within their authority, no action could be maintained against them. 9 *Conn.* 436; 4 *Cow.* 146.

But there is yet another consideration which is entitled to great weight. If the Act of Assembly under which the defendants have acted be (as it undoubtedly is) constitutional, and the plaintiffs are notwithstanding entitled to recover in this suit, the defendants will be liable to be harassed by repeated actions of the same kind, and are entirely without remedy, because there is no mode pointed out in the Act by which the estate of the plaintiffs can be divested. There would seem to be no good reason either, in that case, why an assize of nuisance might not be brought (and the action on the case may be made to answer the same purpose in effect) to abate

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the defendants' dam altogether, although constructed under the admitted and unquestionable authority of the Legislature!

2d Point. But, admitting the right of the plaintiffs generally to maintain their action for such an obstruction as that complained of, it is further contended that, if their mill and dam were below the high-water mark on the Youghiogheny river, they are not entitled to damage for swelling the water merely up to that point. The proof in the case was, that their mill could not run in high water even before our erection. This position is founded on the common law principle that the right of soil of owners of lands bounded by a navigable river, extends only to high-water mark. 6 *Mass.* 435; 6 *Cow.* 578; 1 *Halsted* 1. In further support of this principle as applicable to fresh-water rivers in this State, it is only necessary to refer to one or two cases decided in our own courts. In *Commonwealth v. Fisher*, (1 *P. R.* 467), compensation was denied to the owner, in the case of a spring between the high and low-water marks on the Susquehanna, which was overflowed by one of the State's dams. *HUSTON, J.*, in delivering the opinion of the court, remarked, that all below high-water mark on navigable rivers was public property, and that the State never sold lands below that point. The same doctrine was afterwards recognised in the case of *Zimmerman v. Union Canal Co.*, and in *Ueberoth v. The Lehigh Navigation Co.*

3d Point. But, supposing the crest or upper surface of the defendants' dam to be so far below the level of the plaintiffs' wheel as to create no obstruction, except when the water is above the ordinary stage and running considerably over their dam; are the defendants responsible in that case? It has been already decided in this State that the proprietor of lands on a private water-course is entitled to the fall of the stream in its natural state, as it passes through his lands. It would seem, therefore, to follow, as a matter of course, that he is entitled to back the water in that state up to his own line. If, however, in consequence of a flood, it should be so swollen as to throw it upon his neighbour, he is certainly not responsible for any injury which might be occasioned thereby. It is, at the worst, merely incidental or consequential, (*HUSTON, J.* in *Alexander v. Kerr*, 2 *Rawle* 91); and, being superinduced by the act of Providence, is not remediable at law. 4 *Rawle* 23.

4th and 5th Points. But the plaintiffs were bound to show their compliance with the terms and provisoes of the Act under which they claimed, and that they were moreover the owners of the adjoining lands. That they were so bound, is obvious from the consideration that their dam is against common right, and is, *prima facie*, a nuisance; and their title is made expressly to depend on the condition that they do not impede the navigation, and that they also construct and keep open a convenient passage for boats, &c. It is a part of their title, therefore, and ought to be duly set forth and proved. 2 *Stark. Ev.* 912; 6 *B. & C.* 317. So too with

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regard to the ownership of the adjoining lands. The right, if any, is annexed to the ownership, and cannot subsist elsewhere. They have, however, set out merely a possession, and, in virtue thereof, a title to the use of the running water. But possession, even for 21 years, would clearly make no title as against the public; and, *primâ facie*, the title is still in the latter. If the plaintiffs are entitled, it is by virtue of an agreement or license, and not in consequence of any possession of, or even ownership in the adjoining lands; and the averment by reason of the possession, is therefore improper. 2 *Saund. Plead. & Ev.* 687; 4 *East* 107; 6 *East* 438. Here the declaration avers merely a common law right in respect of the possession of lands, to the running waters of a navigable stream. This, however, cannot be. It is therefore the case of a defective title, and not of a good title defectively set out; and the plaintiffs cannot, upon their own showing, recover.

Miller, for the defendants in error, cited 3 *Watts & Serg.* 540; 8 *Cow.* 145; 4 *Wend.* 9; 9 *Watts* 228.

The opinion of the Court was delivered by

GIBSON, C. J.—The question for decision depends on considerations that did not enter into the case of *The Union Canal Co. v. Landis*, (9 *Watts* 228). In that case, the grant to the individual contained a reservation in favour of the company to whom a prior right had been granted, which put at rest every pretence of claim to damages for acts subsequently done to the prejudice of the second grantee. The reservation was perhaps superfluous; but it seems to have been thought a judicious precaution, because a license followed by a permanent erection for the enjoyment of it is generally irrevocable; and it might have been deemed a contract, in that instance, which the State could not impair. But what grant is there in the statute of 1803 to require a reservation? That statute gave riparian owners liberty to erect dams of a particular structure on navigable streams, without being indictable for a nuisance; and their exercise of it was consequently to be attended with expenditure of money and labour. But was this liberty to be perpetual, and for ever to tie up the power of the State? or is not the contrary to be inferred from the nature of the license? The object was not to give a new and an irrevocable right; but to restore the qualified use of an old one, so long as it should consist with the public good, by remitting the owner of the soil to the situation in which he stood before the stream was made a highway; and the statute did no more than operate a partial repeal of the Act which had declared it to be so. It reconciled a modified enjoyment of the owner's ancient right, to the present enjoyment of the public right of navigation and fishery. Hence it provided that the owner of land on the shore of a navigable river, declared by law to be a highway, might erect a dam on it,

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if it were so constructed as not to "obstruct or impede the navigation, or prevent the fish from passing up the same." Is there anything like the offer of a bargain in that? So far was the Legislature from seeming to abate one jot of the State's control, that it barely agreed not to prefer an indictment for a nuisance, except on the report of viewers, to the Quarter Sessions. But the repeal of a penalty is not a charter; and the alleged grant was no more than a mitigation of the penal law. It barely placed the owner of the soil in a position almost as favourable as that in which the declarative law had found him; and if that position were to secure him from disturbance by any further measure of public improvement, the State would be incompetent to declare any river a highway on which there happened to be a mill-dam. The statute is *pro tanto* a repealing one, which offers no express compact to any one; and such a compact is never to be implied. It was ruled in *The Charles River Bridge v. The Warren Bridge*, (11 Peters 420), that the State is not presumed to have surrendered a public franchise, in the absence of proof of an unequivocal intention to do so. It would seem that the public dominion may be parted with, but not without an explicit renunciation of it. And this relieves the case from the pressure of that clause in the Constitution which declares that no State shall pass a law impairing the obligation of contracts.

It is contended, however, not so much that the power of the Legislature falls short of a case like the present, as that it can be exerted only on the basis of compensation made or secured; and that for damage done by the authority of the State, there is, in every case without it, redress by action: in other words, that the authority is void. We must not forget, however, that the State is a sovereign who cannot be sued against her consent; and that there are no other limitations to her power over private property than those that are placed upon it by the Constitution. What are they? "No person shall, for the same offence, be twice put in jeopardy of life or limb; nor shall any man's property be *taken* or *applied* to public use without the consent of his representatives, and without just compensation being given." Again: "In all criminal prosecutions, the accused hath a right to be heard by himself and his counsel; to demand the nature and cause of the accusation against him; to meet the witnesses face to face; to have compulsory process for obtaining witnesses in his favour; and, in prosecutions by indictment or information, a speedy trial by an impartial jury of the vicinage: he cannot be compelled to give evidence against himself; nor can he be *deprived* of his life, liberty or *property*, unless by the judgment of his peers, or the law of the land." Now, it cannot be said that the plaintiff's mill was taken or applied, in any legitimate sense, by the State, or by the company invested with its power; nor can it be said that he was deprived of it. In the case of *The Philadelphia and Trenton Rail-*

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road, (6 *Whart.* 25), the words in the first paragraph were allowed to have their obvious and popular meaning, so as to be restrained to property taken away, and not extended to property injured by an act which did not amount to an assumption of the possession; and the same rule of interpretation would give the same meaning to the word "deprived," in the second. It is true, that a nuisance by flooding a man's land was originally considered so far a species of ouster, that he might have had remedy for it by assize of novel disseisin, or assize of nuisance, at his election; but we are not to suppose that the framers of the Constitution meant to entangle their meaning in the mazes of the *jus antiquum*. It was aptly said by Chief Justice TILGHMAN, in *The Farmers' and Mechanics' Bank v. Smith*, (3 *Serg. & Rawle* 69), that conventions to regulate the conduct of nations are not to be interpreted like articles of agreement at the common law; and that where multitudes are to be affected by the construction of an instrument, great regard should be paid to the spirit and intention. And the reason for it is an obvious one. A constitution is made, not particularly for the inspection of lawyers, but for the inspection of the million, that they may read and discern in it their rights and their duties; and it is consequently expressed in the terms that are most familiar to them. Words, therefore, which do not of themselves denote that they are used in a technical sense, are to have their plain, popular, obvious, and natural meaning; and, applying this rule to the context of the Constitution, we have no difficulty in saying that the State is not bound beyond her will to pay for property which she has not taken to herself for the public use.

If, then, the State would not be bound to pay for the damage done to the plaintiffs' mill, had she been the immediate cause of it, how is the defendant bound? The company acted by her authority, as well as for the public benefit; and consequently with no greater responsibility than is imposed by the Constitution, which, it must be admitted, has narrowed the protection that the delegation of her power would otherwise have afforded. "The Legislature," it is said in the tenth article and fourth section, "shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owner of such property, or give adequate security therefor *before* such property shall be taken." A corporation, then, must pay or secure the price of the property before it is taken; but the State must provide the means of payment at the passing of the Act. The difference is less in reality than appearance; and, in every other respect, the delegation of a valid authority protects the agents of the State as amply as it protects the State herself. Still, it is only to a case of taking that the obligation extends; and when a corporation acts by virtue of a constitutional law, it is subject to no other responsibility for acts of consequential damage, than is spe-

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cially provided for. But there is no provision for consequential damage in the statute by which the defendant has been incorporated. The eighth section provides for damage to the shores; and the sixteenth, which authorized the owners of private dams to make them part of the public works, has been repealed without giving them the same compensation for damages to their mills, as suggested by the company, that is given to the owners of the shores for damage to the soil. But the suggested provision would scarce have reached the case before us; for the plaintiffs' mill is seated, not on the Monongahela, which is the river that was in legislative view, but on the Youghiogeny, several miles above its confluence. Moreover, the compensation could have been had only by an award of freeholders, appointed by the parties or a justice of the peace, pursuant to the act of incorporation, and not by an action at the common law. If, then, the statute is constitutional, as it undoubtedly is, there is an end of the question; for a valid law necessarily affords a defence for acts commanded or authorized by it.

It is not, therefore, enough to set before us a case of moral wrong, without showing us that we have legal power to redress it. Beyond constitutional restraint or legislative power, there is none but the legislative will, tempered by its sense of justice, which has happily been sufficient, in most cases, to protect the citizen. Compensation has been provided for every injury which could be foreseen, whether within the constitutional injunction or not, in all laws for public works by the State or a corporation; though cases of damage have occurred which could neither be anticipated nor brought within the benefit of the provision by the most strained construction. In one instance, a profitable ferry on the Susquehanna, at its confluence with the Juniata, was destroyed by the Pennsylvania canal; and, in another, an invaluable spring of water, at the margin of the river, near Selinsgrove, was drowned. These losses, like casualties in the prosecution of every public work, are accidental, but unavoidable; and they are but samples of a multitude of others; so that the plaintiffs have at least the miserable good luck to know that they have companions in misfortune: would that it were in our power to afford them more solid consolation!

HUSTON, J., *dissentiente*.—As I cannot, after the most deliberate consideration, concur in the opinion of the majority of the court, I shall state my reasons.

The Youghiogeny was declared a highway on the 13th April 1782. It is not so long a stream as Pine Creek or Toby Creek, and perhaps does not pass, in a year, so much water as either of those streams, or as French Creek, or Bald Eagle, or Fishing Creek, in Columbia county, or some other streams, called creeks, in this State. It is, therefore, within the letter and spirit of the

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Act of 23d March 1803, which permits persons holding lands on any navigable stream declared by law a highway, to erect a dam for a mill or other water-works on the same stream, adjoining his own lands, and to keep the same in good repair, and to lead off the water, &c., with a proviso as to obstructing the navigation, and a proviso that the person so erecting said dam shall not infringe upon or injure the rights or privileges of any owner or possessor of any private property on such stream. Before this stream was declared a public highway, the right of the riparian owner was the same as it became by this law, except that the law restricted the height and slope of the dam.

I understand the opinion of the court as admitting (what could not be denied) that a license, which could not be enjoyed without, and which was followed by the expenditure of money and labour, is irrevocable. In this case it was followed by a dam across the stream about two feet high, but so constructed as not to injure the navigation, and a large stone mill, two stories high—and to erect these cost much labour and expense. It restored the owner of this mill to the same right as before the Act of 1782, except as to the height and shape of the dam. His dam was no longer a nuisance, and no person could remove or injure it with impunity. 3 *Serg. & Rawle* 273; *Criswell v. Clugh*, (3 *Watts* 330). The State, after a mill had been erected under this law, had the same right as it had in all other cases, viz. to take the water of this stream or to overflow this mill, in improving the navigation of that stream, or any other navigation, upon *payment for the damage*, and it had no other right, and could give no other right.

There is sometimes a little confusion as to what is a contract. There is as much contract as to this dam and mill, as to the land adjoining, or to any house or barn or land in this State; and rather more, for there is an express legislative permission to make the dam and build the mill. I do not contend that the operation of the Act of 1803 ties up the State from making public improvements, but it puts the dam and mill under the protection of the law, and they cannot be taken or destroyed without compensation.

I shall not cite authorities to prove that a man specially injured shall in all cases have remedy by action. It was at one time doubted whether actions of trespass or case lay against a corporation. It has been long settled that a corporation is as liable and suable as an individual. In *Turnpike Co. v. Rutter*, (4 *Serg. & Rawle* 6); and *Riddle v. Merrimack Canal*, (7 *Mass.* 169), this point was very fully argued and considered. But I have higher authority. By the Constitution of this State, art. 9, § 10, no man's property shall be taken or applied to public use without the consent of his representatives, and without just compensation being made. § 11: That all courts shall be open, and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice adminis-

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tered without sale, denial or delay; and in article 7, § 4, the Legislature shall not invest any corporate body or individual with the privilege of taking private property for public use, without requiring such corporation or individual to make compensation to the owner of said property, or give adequate security therefor, before such property shall be taken.

It is remarkable that neither the plaintiff nor the defendant read these clauses of the Constitution. The assertion that property could not be taken was made; but the 11th section, giving the right to sue and obtain redress, was never mentioned, nor, as I recollect, alluded to; and, in my opinion, it is most material and compulsory on the court to grant redress. I have more than once expressed my opinion as to the frequent resort to constitutional question, where there is no such question in the case. There is, and must be, an unlimited power, on certain subjects, in every government; and it is often right, and often practised by the Legislature, to act on this principle. The use of a written Constitution is to fix limits to this otherwise absolute power; and in this sense peculiarly it is the supreme law of the land. Whatever is absolutely prohibited or positively enjoined cannot be altered until the Constitution is changed by the people, or by a revolution. The last words of the Constitution are: "To guard against transgressions of the high powers we have delegated, we declare that everything in this article is excepted out of the general powers of Government, and shall for ever remain inviolate." Now the prohibition to take or apply private property without compensation, and the command to the courts to give redress, are both in that article, and the act of a Legislature which should so take or apply it, or of a court which should refuse redress, would each be contrary to the letter and spirit of that instrument.

But an opinion, not called for in that case, given, too, after all that was material had been rightly and clearly decided, has been cited in this case. 6 *Wharton* 45, 6. The court had rightly decided that the street of an incorporated town or city was a public highway, (so much so, by-the-bye, that the Quarter Sessions cannot vacate it as they can common highway), and that no one person had more right to it, as a highway, than every other person had. Instead of stopping here, it went on to say that taking, meant taking away altogether. 5 *Conn.* 166; 6 *Cow.* 525. Now where no person has an exclusive right to a way, he cannot be deprived of any individual right, so long as it is an open highway; and whether it is changed to a turnpike or macadamized road or a railroad, it is still a highway; belongs to the public, and may be improved, altered, &c. by the Legislature. No individual has any private right in it, and none can be taken from him.

But Clark's Ferry and Richter's Spring have been mentioned. The Susquehanna was a public highway before any right in Clark; he purchased both shores, and had a ferry. The northern road to

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Pittsburgh and the road up the Susquehanna crossed at his ferry. Long before any canal, the Northern Turnpike kept above the mouth of the Juniata, and the ferry was moved to suit the traveling. Soon after, a bridge was erected over the Susquehanna, just below the ferry, and everybody crossed on the bridge, and the ferry was abandoned. The same thing happened at Harrisburg, where two ferries, one below and the other above the island, were abandoned, though no canal was near them, and at Sunbury, and Derr's Town, and Dansville, &c. As to Richter's Spring, the injury to it was only a figurative one in the counsel, and the court (opinion by myself) did not know that the canal was on the island, and the spring was near the main shore, with a branch of the river between it and the island, and no dam below to throw the water back on it, nearer than the mouth of the Juniata, about thirty miles below it.

Judgment reversed.

Bailey *against* Bowman.*

The debts of a decedent not secured by matter of record cease to be a lien on his real estate in the possession of the heirs after the lapse of seven years; and a judgment obtained against the personal representative, and a levy and sale of the land after that period, confer no title upon the purchaser.

APPEAL from the decision of the Circuit Court of *Fayette* county.

This was an ejectment brought by Bailey and others, the representatives of Samuel Jackson, to recover an undivided moiety of 100 acres of land in Washington township, Fayette county, including glass-works. The defendant relied on a sheriff's deed of the land; it having been sold on a judgment against the executors of Jackson. The suit in which this judgment was obtained was not brought until seven years after the death of Jackson. The court held that no title passed by the sheriff's sale.

Biddle, for the appellant, examined the provisions of the Act of 4th April 1797, and reviewed the cases of *Kerper v. Hoch*, (1 *Watts* 9; and *Bruch v. Lantz*, (2 *Rawle* 417), arguing that the point now raised was not so distinctly presented and decided in the former as in the latter case.

* This case was decided in 1834, but the report of it was mislaid, and has been but recently recovered. A reference to it occurs in the case of *Quigley v. Beatty*, (4 *Watts* 15). It presented the most elaborate effort that was made to shake what is now the settled construction of the Act of 1797. — REFS.

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Ewing and *M'Giffen*, for the appellees, whom the court declined to hear.

The opinion of the Court was delivered by

GIBSON, C. J.—The argument rests on an assumption, unfounded in fact, that the decision in *Kerper v. Hoch* was but the *dictum* of the Judge who delivered the opinion of the court. The truth is, it was the unanimous and deliberate judgment of the Judges present, (Mr Justice ROGERS being absent), after a very full argument; and it received the acquiescence of the only Judge who sat in *Bruch v. Lantz*, in order to avoid a division, and to establish a rule which should be firm and stable for the future. This rule has been recognised in at least one case, not yet reported; and it is to be taken for the fixed construction of the statute. The most that can be said against it, is, that it is inconsistent with what was taken for granted in *Bruch v. Lantz*, which was decided upon what was supposed to be the current opinion of the profession. That the principle of that case was received without examination, is plain from the printed report of it, in which there is no inquiry into the foundation of the supposed distinction between purchasers and volunteers. Perhaps it would have been as well, for the sake of consistency, to have abided by it. Yet there would be little difficulty, if the matter were *res integra*, in pronouncing the construction, ultimately adopted, to be the true one. In the course of a very few years, it is not only possible, but common, for one who has derived an estate from the bounty or demise of an ancestor, to become, in an equitable sense, a purchaser of it; and it would be strange if the courts should feel themselves restrained by common law analogies, intended to be dispensed with in cases within the letter, from extending the provisions of a remedial statute to cases in the very same mischief. That the donee becomes a purchaser by the consequential expenditure of money or labour, is the foundation on which a parol gift of land to a child is sometimes made effectual against the letter of the statute of frauds. In regard to that the application of the statute is governed by the special circumstances of the case; and hence many critical distinctions and much litigation. It was thought better, in the end, to avoid these by establishing one rule for all. Beside, as regards the possessor of the estate, that is a disabling statute, while this is an enabling one, whose policy is evidently to encourage the possessor to treat the estate as his own; and it ought, therefore, to be more beneficially construed.

Judgment affirmed.

Nesbit *against* Greaves.

Insolvent bond dated 11th January, conditioned for appearance on the third Monday of March ensuing (21st), to present petition, &c. for the benefit of the insolvent laws. On the 18th March the debtor applied for the benefit of the bankrupt law of the United States, under which, on the 17th August, he obtained his discharge. *Held*, that the application and discharge under the bankrupt law excused him from complying with the condition of the insolvent bond.

ERROR to the Common Pleas of *Armstrong* county.

This was an action of debt brought by Horatio G. Greaves against J. N. Nesbit and others, on an insolvent bond dated 11th January 1842. The defendants pleaded payment, and specially that the bond was given by Nesbit conditioned for his appearance at the court ensuing its date of *Armstrong* county, to present his petition, &c. for the benefit of the insolvent laws of this Commonwealth; that on the 18th March following the date of said bond, Nesbit applied for the benefit of the bankrupt law; and that on the 17th August following he received his discharge. The plaintiff demurred to the special plea. The defendants joined in demurrer, and withdrew the plea of payment. The court entered judgment for the plaintiff on the demurrer; which the defendants assigned for error.

J. Stewart, for plaintiffs in error.

W. Stewart, contra.

The opinion of the court was delivered by

KENNEDY, J.—Debt upon a bond executed by the plaintiffs in error, on the 11th day of January 1842, in the sum of \$391, to the defendant in error, conditioned for the appearance of Nesbit, one of the plaintiffs in error, at the next court of Common Pleas, to be held in and for the county of *Armstrong*, on the third Monday of March then next ensuing, and there take the benefit of the insolvent laws of this State. The third Monday of March, in that year, was the 21st day of the month. Nesbit did not appear at the court and present his petition for relief under the insolvent laws, in conformity to the condition of the bond; but previously to that day, on the 18th day of the same month, he applied to the District Court of the United States for the benefit of the bankrupt law, and on the 17th day of August then next following, obtained it. The question then which arises here, is, did Nesbit's application for relief under the bankrupt law, and his subsequent attainment of it, excuse him from proceeding in conformity to the con-

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dition of his bond to obtain relief under the insolvent laws? The court below was of opinion that it did not, and therefore rendered a judgment against him and his sureties on the bond. In this, it is alleged that the court erred, and so it appears to us; as the creditor, the plaintiff in this action and the obligee in the bond, could have derived no possible benefit or advantage from Nesbit's having proceeded and obtained a discharge under the insolvent laws of the State. The proceeding in bankruptcy was commenced in court before any proceeding could be commenced in the State court for the benefit of the insolvent laws; so that the assignees under the bankrupt law became entitled, in trust, to all the property and effects of Nesbit, leaving nothing for him that he could assign, under the insolvent laws, for the benefit of the plaintiff below, or any one else. Besides, the court of the United States having obtained jurisdiction first of Nesbit's case, and its jurisdiction, in such case, appearing to be paramount, under the bankrupt law, to that of the State court; it would, therefore, seem to have been improper for Nesbit to have proceeded in the State court to have obtained the benefit of the insolvent laws. But suppose he had appeared in the State court and presented his petition for relief, but had been prevented from obtaining it, and had thereupon, according to the terms of the condition of the bond, surrendered himself immediately to prison; after having obtained a discharge under the bankrupt law from all his debts, it is perfectly obvious that he could not have been detained in confinement upon such surrender. Why then require a proceeding that could have been of no possible advantage to the plaintiff below, in any possible event that could have occurred? By Nesbit's taking the benefit of the bankrupt law, the plaintiff below obtained every advantage that the assignment of his property and effects could afford, in as full and ample a degree as if he had taken the benefit of the insolvent laws. We are therefore of opinion that the judgment of the court below be reversed, and judgment be entered on the case stated for the plaintiffs in error.

Judgment reversed, and judgment for the defendants.

Smull *against* Jones.*

In an action of ejectment by the heirs-at-law of an insolvent debtor, the executor of a deceased creditor is not a competent juror, and may be challenged for that cause.

In an action of ejectment where the plaintiff's right to recover is founded upon an allegation of fraud in a sheriff's sale of the property as the estate of the plaintiff, all the proceedings by which the sale was made and the exceptions to it and confirmation of it by the court are competent evidence.

If a witness be erroneously rejected by the court, the error is cured by the party's subsequently withdrawing his objection to his competency and agreeing to his examination.

There is nothing illegal in two or more persons agreeing together to purchase a property at sheriff's sale, and fixing a certain price which they are willing to give and appointing one of their number to be the bidder.

ERROR to the Common Pleas of *Dauphin* county.

This was an action of ejectment by John Smull against A. J. Jones, Theo. Fenn, and the Harrisburg Savings Institution, to recover a house and lot in Harrisburg. During the pendency of the suit, John Smull died, and his heirs-at-law were substituted. The plaintiffs' claim was founded upon an allegation of fraud on the part of the defendants and John Snevily in purchasing the property at sheriff's sale as that of the plaintiffs. The facts of the case are sufficiently stated in the opinion of this Court.

Rawn and Fisher, for the plaintiffs in error.

M^cCormick, for the defendants in error.

The opinion of the Court was delivered by

KENNEDY, J. — The first error assigned is an exception to the opinion of the court below in allowing a challenge of William Watson as a juror, who was selected and called as such to try the cause; because it appeared by his own statement that he was the executor and son-in-law of Abraham Oves deceased, to whom John Smull, the ancestor of the plaintiffs, died indebted; and, as it was further alleged, that the said Smull's estate was insolvent, and the land in question in this action, if recovered, would be a fund that must be applied towards the payment of Smull's debts, which would enable Watson to obtain part of the debt, if not all of it, coming to the estate of his testator. It was certainly very natural to suppose that Mr Watson felt some interest in recovering the debt, which it was his duty to collect, as executor, if practicable, and therefore could not be considered as altogether free

* This and the following case were argued at May term 1843.

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from bias in regard to the event of the issue between the parties here. The question, whether Mr Watson was a fit person to serve as a juror, seems to have been submitted to the decision of the court, as triers were not asked to be appointed; and we cannot say that the court decided incorrectly.

The second error assigned includes the 2d, 3d, 4th, 5th and 6th bills of exception to the admission of evidence, and the rejection of John Snevily as a witness. The second bill of exception was to the admission of the return made by the sheriff to the writ of *venditioni exponas*, under which he had sold the property in question to the defendants, and to show also that the money arising from said sale had been brought into court and distributed among the lien creditors of the said John Smull. There was certainly nothing wrong in showing the return of the sale by the sheriff of the property to the defendant. This was rather necessary; and to show that the money arising from the sale so made had been applied to the use of Smull, in paying his debts, could do no harm to the plaintiffs. We therefore think that there is nothing in this bill of exception to justify a reversal of the judgment.

The third bill of exception was taken to an offer on the part of the defendants to show by the records of the court that Smull himself, who was living at the time, obtained a rule, upon exceptions filed in court by him, of the same import as those made now by his heir, the plaintiff, to the sale, to show cause why the sale should not be set aside, and that after a full hearing of the parties, the court discharged the rule, and directed the sale to be perfected by the sheriff. Now although what was done in the court, in this respect, immediately after the sale, may not have been conclusive to establish the validity of it, yet it was the decision of a tribunal that had cognizance of the subject-matter, and being between the defendants and the ancestor of the plaintiffs, from whom they derive their claim to the property, it was not only admissible but pretty strong evidence to support the sale. This bill of exception cannot, therefore, be sustained.

The fourth bill of exception is to the rejection of John Snevily as a witness for the plaintiff. The court conceiving him, from what had been shown, to be interested in favour of a recovery by the plaintiffs, therefore held him incompetent. Although we think that the court was mistaken in considering Snevily interested in the event of this cause, by reason of the promise of Smull to pay him all he owed him at the time he released Smull in consideration of \$400 received of him, because the promise was without consideration and not binding in law, yet we are decidedly of opinion that the error of the court in this particular was cured by the counsel of the defendants subsequently, in the course of the trial, withdrawing their objection to Snevily's being admitted as a witness to testify on the behalf of the plaintiffs. This left the counsel of the plaintiffs at liberty to examine Snevily and have his

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testimony if they pleased; but if they, as it appears they did, voluntarily declined examining him, it cannot be said that they have any right to complain of being injured. *Volenti non fit injuria* is the maxim of law in such cases. This exception, therefore, goes for nothing.

The fifth exception is to the opinion of the court, in permitting the defendants' counsel to ask Ackerson Martin, a witness on the stand, whether he would have bid for the property in dispute at the sheriff's sale of it, if he had been present; to which he answered that he would not, and that he was not kept away from anything that transpired that day. This was objected to as not being relevant to the issue. But this does not seem to be clearly so, for it repelled the inference that the plaintiffs' counsel might otherwise have attempted to draw from other parts of his evidence relative to what passed between him and some of the defendants anterior to the sheriff's sale. This exception, therefore, is not sustained.

The sixth bill of exception is to the opinion of the court in admitting P. C. Sedwick, a witness in the cause, to answer the question put by the counsel of the defendants, whether Fenn, one of the purchasers of the property in question at the sheriff's sale, was, at the time, on speaking terms with Snevily, and had not had a personal difference with him. We cannot say but an answer to this question might properly enough have been entitled to some weight, in determining whether Fenn was likely to be concerned with Snevily, as was alleged on the part of the plaintiffs.

The third error assigned consists of bills of exception to the opinion of the court in rejecting the evidence offered by the plaintiffs in the seventh and eighth bills of exception; and in admitting the evidence offered by the defendant as specified in the ninth, tenth and eleventh bills of exception.

The offer by the plaintiffs, as contained in the seventh bill of exceptions, was to give evidence of the declarations of John Snevily, made on the 6th of April 1840, and repeatedly previously to that date, with respect to the arrangement entered into by and between A. J. Jones, Theophilus Fenn, Ackerson Martin and himself, relative to the purchase of the property in controversy at the sheriff's sale, and the mode and manner in which the parties were to conduct themselves at that sale, and procure the same to be struck down to one of them for the others, for the purpose of establishing that a combination was entered into for the purpose of depressing the price of the property by artifice, and for the purpose of showing that they were to bid this property to \$16,000, if any person bid against them, and if not, to get it as low as they possibly could, but to consider the same as sold at \$16,000, so as to pay their own judgments to the exclusion of intermediate judgments; and that Andrew J. Jones, up to the 6th of April 1840, uniformly denied that John Snevily had any interest in the pro-

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erty, or that he had ever executed any paper showing that Snevily had any interest in said purchase or property. Now, waiving the objection to this offer, that the declarations made by Snevily on the 6th of April 1840 were made on the trial of an ejectment which he had instituted against Andrew J. Jones, to recover a portion of the property in dispute by virtue of an agreement which he alleged he had made with Jones anterior to the purchase at the sheriff's sale, which declarations were all denied by Jones at the time, and therefore may be said to be of no avail as evidence, because the denial of the one was as good as the assertion of the other, and removed all ground for making them evidence as against Jones, the defendant in this case, it is very clear that any and every declaration which Snevily might choose to make "relative to the purchase of the property in controversy at the sheriff's sale, and the mode and manner in which the parties were to conduct themselves at that sale, and procure the same to be struck down to one of them for the others," might not be pertinent to the issue joined in the cause, or have the least effect whatever on the validity of the sale; and unless they were such as tended to show that the purchase at the sheriff's sale was unfairly obtained by Jones, the defendant, it is equally clear that they were inadmissible, and after being objected to by the counsel for the defendants, it was incumbent on the counsel for the plaintiffs to specify particularly to the court the purport of the declarations offered to be given in evidence, that the court might judge of their tendency to establish anything material to the issue; but not having done this, we think that the court decided correctly in rejecting them.

The eighth bill of exception was taken to the opinion of the court in rejecting a second offer, on the part of the plaintiffs, to give the declarations of Snevily, made on the 6th of April 1840, on the trial of the ejectment brought by him against Jones, as mentioned before, without specifying the purport of the declarations so offered to be given in evidence, so as to enable the court to judge of their relevancy to the issue trying. The counsel for the defendants having objected to the declarations of John Snevily, whatever they might be, though having relation to the sheriff's sale of the property, being given in evidence, the court acted correctly in rejecting them, as the plaintiffs' counsel did not specify the purport of them particularly; so that the court might determine whether they were such as might tend to prove anything pertinent to the issue.

The ninth bill of exception was to the admission of evidence, offered by the defendants to show that the property in question was sold at the sheriff's sale to the defendant for a full price, if not more than it was worth. The pertinency and bearing of this evidence on the great question attempted to be raised by the plaintiffs in the cause, was very apparent, as it went to show that the defendant could not have done anything in regard to his pur-

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chase of the property, that prejudiced either John Smull or his creditors, who were the only persons that were interested in having the sale conducted in such a manner as would obtain for the property a price at least fully equal to its value. The fact of its having been sold and bought at such a price, if established, was powerful evidence to show that the purchase and sale had been fairly made; and therefore the evidence complained of in this bill was properly admitted.

The evidence mentioned in the tenth bill of exceptions, and admitted by the court after being objected to by the plaintiffs' counsel, may possibly, under one aspect of the case, have been entitled to some weight with the jury, in order to show that nothing but what was perfectly fair and lawful was intended by the defendant, Jones, in uniting himself with others for the purpose of buying the property in question at the sheriff's sale.

The evidence mentioned in the eleventh bill of exceptions, and received by the court, tended to repel pretty strongly any design on the part of Jones to injure Smull by his becoming a purchaser at the sheriff's sale, by his offering to give up the purchase to Smull or to any friend that he would get to pay the amount of the purchase money. We therefore think it was admissible.

The fourth and remaining errors assigned are exceptions to the charge of the court to the jury. They are of the same nature and character, and consist of exceptions to some remarks made by the court to the jury in regard to the connexion which John Snevily might have had in the purchase of the property, and likewise on the evidence, which, as contended for by the counsel of the plaintiffs, tended to prove a fraudulent combination, on the part of Jones and others, to depress the value of the property as much as possible at the sheriff's sale, and thus injure Smull and his creditors. We are satisfied that the plaintiffs have no reason whatever to complain of the charge delivered by the court to the jury. For it appears throughout to be quite as favourable, and indeed more so, than they had any right to require. For the court, among other things, told the jury that "if it was agreed between Snevily and Jones that their respective judgments should be paid as though the property had brought at sheriff's sale \$16,000, and that Jones alone should bid at the sale, in order to get it as much under the \$16,000 as possible, such agreement was fraudulent; and if they were satisfied of its existence from the testimony, the sale to Jones was void." This direction to the jury, as we conceive, was incorrect in point of law, and much more favourable to the plaintiffs than it ought to have been. The court, on the contrary, ought to have told the jury that such an agreement was perfectly lawful, and therefore would not avoid the sale. It would be repugnant to every principle of common sense, reason and law, to say that two or more, and especially judgment or lien creditors of a debtor, whose real estate had been taken in execution and was about to

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be sold by the sheriff, could not agree to become joint purchasers thereof, provided it were not bid for by others beyond a fixed sum, and that one of them should bid in his own name for the common use of all of them. But it is said such agreement, in its effect, prevents competition, and therefore inevitably tends to depress the price for which the property would otherwise be sold, to the injury of the debtor and the other creditors. Admitting this to be true in part, which is all that can be claimed, at most, what right has the debtor, or have the other creditors, to demand and require that there shall be a competition, either among the creditors of the debtor or among those who are not of his creditors? It would require even more than a casuist to demonstrate that they or any of them have such right. Every man must be left to act as he pleases in such case; that is, either to bid singly for the property, if he wishes to buy, and be able, or to unite with others, as he may think it most suitable to his means, and most advantageous to himself in any other respects. But it is far from being true that every agreement of the kind has a necessary tendency to lessen the price that otherwise might be obtained for the property at the sale; on the contrary, it may tend to increase it. For instance, where there are a number of lien creditors who singly have not the ability to buy, but by uniting their means they are enabled to do so, and thus not only create a competition that could not otherwise exist, and for the purpose of securing the payment of their claims ultimately by a re-sale of the property, may be induced to give more for it at the sheriff's sale than any other person or persons are willing to do. The truth of this illustration must strike the mind of every one in the least degree conversant with the ordinary transactions of life, and goes to show that no principle of public policy can be set up or interposed, to interfere with or prevent men from acting upon such occasions according to their own will, and as their ability may enable them. Indeed, it appears to me, from all the evidence given in this case, taken in connection with that which was offered and rejected, so far as the nature and purport of it has been expressed and made known, that nothing like a conspiracy to defraud John Smull or any of his creditors was ever formed or intended. That an agreement relating to the purchase of the property in question at the sheriff's sale which was about to be made, was entered into by the defendant, Jones, and other creditors of John Smull, the owner of the property at the time, is very evident; but it is equally evident that the object of the agreement was that they might be enabled, by a union of their means, to go so far in bidding for the property as to make the price of it cover their claims, or otherwise buy it at such price as would enable them to have their claims paid possibly by a re-sale of it. And I also think that the result of the agreement was that the property was sold for a higher price than it would have been if such agreement had not been made.

Judgment affirmed.

Haldeman against Michael.

The confession of a judgment to a creditor with a view to prefer him, is not invalid by reason of the provisions of the Bankrupt Law, if it be not voluntary but the effect of measures taken by the creditor or in his power to take; and it is incumbent on the party who seeks to defeat the transaction, to show clearly that it is voluntary.

ERROR to the District Court of *Lancaster* county.

On the 31st July 1841, William P. Michael executed a bond with warrant to confess judgment to John Friday, conditioned for the payment of \$969 on the 1st April 1842, which was entered on record on the 3d August 1841. On the 2d July 1842 Michael executed a bond with warrant to confess judgment to Peter Haldeman, conditioned for the payment of \$735.36 on demand, which was entered on record the same day, and a *feri facias* was issued and levied on the defendant's personal property, which was sold for \$773, and the money brought into court. On the 14th July 1842 a *feri facias* issued upon the judgment of John Friday, which was levied on the real estate of the defendant; and upon a *vend. exponas* issued on the 12th October 1842, the same was sold for \$1814, and the money brought into court. On the 12th July 1842 Michael confessed ten other judgments to his creditors.

On the 22d September 1842 a petition of the creditors of Michael was presented to the District Court of the United States, setting forth "that the said William P. Michael, retailer of merchandise, is justly and truly owing debts exceeding \$2000, and also owing unto the said petitioners the sum of \$500 and upwards, and that he did lately, to wit, on the 1st day of June last past, become bankrupt within the Act of Congress in this case made and provided, to wit, by committing one or more of the acts hereinafter mentioned, of which due proof is ready to be given by the petitioner at such time and place as the court shall direct. To wit, that said Michael being seised of certain real estate and possessed of certain personal property in the county of Lancaster and district aforesaid, on the 1st day of June last past and at divers days thereafter, in contemplation of bankruptcy and for the purpose of giving the persons hereinafter named, creditors, endorsers and sureties of the said Michael, a preference or priority over the general creditors of the said Michael, made and executed to John Killinger and others, Peter Haldeman, William Michael, Jonas Garber, Jacob Neff, Michael Esbach, John Newcomer, John Friday, Benjamin Hershey, John M. Culp, A. S. Rohrer, Joseph Neff, John Fry, separate bonds with warrants of attorney to con-

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fess judgments thereon against the said Michael, bearing date the 1st day of June last past, and on divers days thereafter. Upon such said bonds judgments were entered against the said Michael in the Courts of record for Lancaster county and State of Pennsylvania on the said 1st day of June last past and on divers days thereafter, and executions issued thereon of the 2d day of July last past and on divers days thereafter; and further, that the said Michael on the 1st day of June and 2d day of July last past, did willingly and fraudulently procure his goods and chattels, lands and tenements to be attached and taken in execution. Wherefore, the petitioners pray that due proceedings being had in the premises, the said Michael may be declared a bankrupt within the purview of the Act of Congress in such case made and provided, and other proceedings had thereon as are conformable to the said Act and to justice and equity may appertain."

On the 28th October 1842 Michael was duly declared a bankrupt and Israel Carpenter was appointed his assignee, who came into court and obtained a rule in the case of Haldeman against Michael "to show cause why the judgment should not be vacated and the execution set aside, and the sheriff ordered to pay the proceeds of sale of the personal property to the assignee in bankruptcy of the defendant:" and in the case of Friday against Michael "to show cause why the *feri facias* levy, inquisition, condemnation and sale should not be set aside."

HAYES (President). The Bankrupt Act declares that all future securities, &c., given by any bankrupt in contemplation of bankruptcy and for the purpose of giving any creditor, &c. any preference or priority over the general creditor of such bankrupt, shall be deemed utterly void and a fraud upon such Act. This enactment cannot affect the judgment of John Friday, of June term 1841, No. 245, for \$969, which was entered on the 3d day of August 1841; because that was before the passage of the Act. Nor is that judgment, indeed, included in the enumeration of those of which the petitioners complained. "All the provisions of the Act as to voluntary or involuntary bankruptcy"—this is the language of Judge STORY—"are prospective; that is, the parties and the facts must exist and fall within the predicaments pointed out after the passage of the Act." 5 *Law Reporter*, No. 7, p. 295. It was on this judgment that the defendant's real property was taken in execution and sold by virtue of the writs mentioned in the last of the above rules. These proceedings were clearly not in contravention of the Bankrupt Law, but were the regular judicial consequences of the lien obtained by Friday before the law existed. The rule to show cause why the *feri facias*, levy, inquisition, condemnation, the *venditioni exponas* and sale thereon made in the case of Friday v. Michael shall not be set aside, must therefore be discharged.

The judgment of Haldeman against the defendant was entered

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and the bond with the warrant to confess judgment was given after the passage of the Bankrupt Law; namely, on the 2d day of July 1842. On the same day the *feri facias* was issued on which the personal property of the defendant was levied and sold. This was two months and twenty days before the petition of Boyd and Cummins to have Michael declared bankrupt was filed. That the judgment-bond was executed for the purpose of giving Haldeman a preference over the general creditors of Michael, there can be no doubt; but that it was given in contemplation of bankruptcy, it lies upon the general creditors to prove. According to the American cases, which arose under the Bankrupt Act of 1800, as well as the English authorities on the subject of bankruptcy, payment or security to a creditor and with a view to prefer him is valid, if it be not voluntary but the effect of measures taken by the creditor or in his power to take. The slightest solicitation on the part of the creditor will protect the transaction. Unless it clearly appear that the act originated with the debtor and that he took the first step to make the transfer, it will not be deemed a fraudulent preference; and it is incumbent on the party who seeks to defeat the transaction, to show that it is voluntary. In 5 *Johns*. 412, in the Court of Errors of the State of New York, it was said by SPENCER, J., in delivering the opinion of the court, "that an insolvency is no objection to giving a preference, unless it be shown that a bankruptcy was contemplated at the time, was decided in the Supreme Court in the case in 3 *Johns*. 83. That principle will be found admitted and acted upon in a great variety of cases. It is founded in the right which every man has to dispose of his property to whom he pleases for an adequate consideration and in satisfaction of his debts, until he commits an act of bankruptcy or contemplates so to do; and where a part only of the insolvent's estate is transferred for the payment of a just debt, though the act be voluntary on the part of the insolvent, the transaction is not on that ground impeachable." 5 *Johns*. 426, 427.

The evidence in this case clearly shows that the judgment-bond given to Haldeman was not voluntary in the sense of these authorities; that Michael did not take the first step in regard to it; but that it was anxiously sought by the plaintiff, who insisted upon it, in order that he might be placed on an equal footing with two other creditors, to whom the defendant had given similar securities. It also appears that the defendant, instead of voluntarily or spontaneously giving such bond payable on demand, was desirous of having it made payable in six months after date, in which he was overruled by the plaintiff, by whose agent he was told, when he suggested the delay in payment, that this bond was in the form which Haldeman commonly used. Again; this security by no means covered the whole amount of the defendant's property; estimating it according to the proceeds of the subsequent sales by the sheriff and taking also into the account the prior liens, there

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would be still a surplus; and it appears from the deposition of Roberts that Michael valued his real estate at \$3000 and said it cost him more, though it yielded but \$1754.44, when sold. The evidence further shows that the bond to Haldeman was not given in contemplation of bankruptcy, but that Michael had at that time made new purchases of goods on credit, in order to prosecute his business, and that on finding, to his manifest surprise, the sheriff had seized his personal property, he directed those goods which were *in transitu* to be returned to the vendor. As the making of that security was not an act of bankruptcy, so *à fortiori* was not the previous judgment-bond given on the 1st of June 1842, to Killinger, Shertzer and Bowman; and much less, the judgment obtained by Friday, already noticed.

I am, therefore, clearly of opinion that this case falls within the provisos of the 2d section of the Bankrupt Law, which are as follows: "*Provided*, That all dealings and transactions by and with any bankrupt, *bonâ fide* made and entered into more than two months before the petition filed against him or by him, shall not be invalidated or affected by this Act: *Provided*, That the other party to any such dealings or transactions had no notice of a prior Act of Bankruptcy or of the intention of the bankrupt to take the benefit of this Act; and provided, also, that nothing in this Act contained shall be construed to annul, destroy or impair any lawful rights of married women, or minors, or any liens, mortgages or other securities on properties real or personal, which may be valid by the law of the States respectively and which are not inconsistent with the provisions of the 2d and 5th sections of this Act." Accordingly, the rule on behalf of the assignee of the bankrupt to show cause why the judgment of Haldeman, of June term 1842, No. 174, shall not be vacated and the execution set aside and the sheriff ordered to pay the proceeds of sale of personal property to the assignee in bankruptcy of the defendant, is discharged. And the rule to show cause why the amount of the plaintiff's judgment should not be paid out of the proceeds of the defendant's property now in court, is made absolute.

Errors assigned:

1. The court erred in discharging the rule to vacate the judgment of Haldeman v. Michael, and also in discharging the rule to vacate the judgment of Friday v. Michael.

2. In directing and decreeing the money in court to Haldeman.

Frazer and Parke, for plaintiff in error.

Stevens and Ellmaker, contra.

PER CURIAM.—The decree of the court is affirmed for the reasons given by Mr Justice HAYES.

Decree affirmed.

Parker *against* Donaldson.*

In an action of *assumpsit* for goods sold and delivered, the plaintiff having read in evidence the deposition of a witness, it is competent for the defendant to read the testimony of the same witness taken upon a former trial of the cause and made part of the record by a bill of exception, not only to contradict the facts stated in the deposition, but to prove other facts material to the issue.

In the trial of a cause depending upon the facts in evidence, if the court in their charge to the jury review those only which have a tendency to establish one side of the case, it is calculated to mislead the jury, and is error for which the judgment will be reversed.

ERROR to the Special Court of Common Pleas of *Columbia* county.

Samuel Parker against William Donaldson. This was an action of *assumpsit* to recover the price of goods sold and delivered, the facts of which are fully stated in the former report of the case. *2 Watts & Serg.* 9. Those which gave rise to points now ruled are sufficiently stated in the opinion of the court and the following bill of exceptions:

Upon a former trial of the cause the deposition of William C. Edwards had been taken by the plaintiff, but the witness being in court, his testimony was taken. This testimony was made the subject of a bill of exceptions: and upon a writ of error the judgment was reversed and a *venire de novo* awarded. On the present trial the witness was not present and the deposition was read by the plaintiff. The defendant offered to read from the record of the former trial the testimony of William C. Edwards; to contradict his deposition; to prove that at the time of the purchase of the goods Edwards & Verree were indebted to the plaintiff; that the goods in question were purchased of them and not of the plaintiff; and many other specified facts. The plaintiff did not object to it or any part of it which contradicted the witness's deposition, but objected to it on all the other grounds. The court overruled the objections and permitted the testimony to be read.

Greenough, for the plaintiff in error.

Comly and *Cooper*, contra.

The opinion of the Court was delivered by

HUSTON, J. — This case was before this Court formerly, and is reported in *2 Watts & Serg.* 9, in which case the testimony of William C. Edwards is copied verbatim, and the testimony on this

* This case was argued at July term 1843.

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trial was read from the record of the testimony in that case, because the attendance of the witnesses could not be procured or was dispensed with by consent; and for this testimony and that of H. Smith, J. B. Kay, and Christian Dull, I refer to that report. James Verree was examined in this trial, and his testimony varied from that reported in being a little more full and precise than at the former trial. He states that Parker sent a bill of goods to their house, and that it read; "William Donaldson to Samuel Parker;" and then followed the bill of goods; "Edwards requested me to charge this to 'William Donaldson, Dr to Edwards & Verree.' I don't think Donaldson was in at the time this was done. Don't think anything was said about the reason for changing." The witness had been absent in the southwest a long time, and had returned a few days before. He says: "I don't know what conversation passed between Parker and Edwards. As far as I was concerned, I did not purchase those goods of Parker. The account of sales was made out to Mr Parker, and showed that bill and several others sold for Mr Parker's account. I believed, from all the circumstances at the time, that they were Parker's goods." He then said: "I never charged Donaldson with those goods. I don't remember that our firm bought any goods after my return from southwest, about 21st or 22d April." Another matter not stated in the report is: "I don't think our store was completely empty when Donaldson was in our store. I don't think we had any sugars of our own; there was some of Mr Levering's; there might have been some teas. There was some coffee of very inferior quality, kegs, spices. All that was in our store was ours, and Mr Levering's not worth over \$500 or \$1000."

I shall not state all the proof about former sales to Donaldson by Edwards & Verree, and their having got some of the goods from Parker; their taking Donaldson's notes for those goods, and immediately transferring them to Parker in payment for those goods got from him; nor all that was said about Donaldson having lent his notes to Edwards & Verree and having been compelled to pay them; for though this might show why Donaldson might be desirous to get payment in goods or anything else from them when he found them failing, yet this cause must depend, not on what was his wish, nor on what was the wish of Edwards & Verree, but on what took place and was agreed on as to these goods; not on former dealings, but on the facts and agreements in this transaction.

As to the bills of exceptions, I cannot say there was clearly error; for although some of the testimony had but a remote bearing on the matter trying, yet in an action of *assumpsit*, where the evidence is doubtful, almost anything which may probably throw light on the matter, is usually, and in general properly admitted; and if not pertinent—if after the whole has been heard it is found not to bear on the real point in issue—it is proper for the Judge

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to tell the jury so. This is sometimes done, and sometimes the Judge in charging the jury omits to mention it; and if not asked to mention it, this omission may have been intended by the Judge to show it was considered by him irrelevant; and the omission to mention or allude to it is not error, unless, as said, he had been asked to charge the jury as to the effect of it. Edwards had given a deposition, as I understand the case, before the last trial, but as he attended at that trial it was not read. He was then called by the plaintiff and cross-examined by the defendant at great length. When this trial came on the plaintiff read his deposition, and as his examination was made by bill of exceptions a part of the record, the cause having been sent back on a *venire de novo*, the defendant offered to read from the record the whole of what he swore in court. Under such circumstances it was not error to receive it. The effect of the whole, together with other testimony, was to decide, in a great measure, what would be the law of this case, for the law depends on the facts, on the agreement of the parties, and what was done in pursuance of those agreements.

As I have stated that in some cases it is not easy or not possible to know what bearing facts or circumstances may have on the matter trying, until the whole evidence has been given and the points of law stated and considered, it may be proper to insist that some of the matters given in evidence ought to be thrown out of view by the jury, and the Judge may, and sometimes ought to give his opinion as to such matters, but not in terms too peremptory, for the jury have the right to judge of the truth of testimony and credibility of witnesses, and also to draw inferences from facts and circumstances proved in the case. This is proved by the law on demurrer to evidence, on which the party demurring may be called on to admit not only the truth of the testimony given, but all fair inferences which a jury might draw from those facts.

After the testimony was closed, the counsel of the plaintiff proposed certain points to the court; the answers given have been pressed here as errors.

1. The defendant, William Donaldson, having proved by William C. Edwards and James Verree that the said Edwards & Verree were not in possession of the goods in question nor intrusted with them at the time of sale, and having proved also that Edwards told him explicitly that they "had not the articles," that "the goods did not belong to them," but that "they could get them for him and make a commission by furnishing them to him, and the only advantage to them would be the commission on the sale to him," and having received the goods, is bound to pay Samuel Parker, the owner, whether Edwards & Verree were indebted to him or not at the time on an unsettled account.

In assigning error on the answer the counsel have insisted that the Judge did not answer the point proposed and that he drew the attention of the jury to another and different point. The

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answer of the court was: "In this point it is stated that defendant has proved certain facts by Edwards. It is but just to bear in mind that the plaintiff introduced the deposition of this witness in the first place, and that the defendant, for the purpose of contradicting that witness, as well as for other purposes, gave in evidence his testimony taken on the former trial, when he was called as a witness by the plaintiff. It is also stated not hypothetically and open for decision for the jury, but as 'proved,' that Edwards & Verree were not in possession of the goods in question, nor intrusted with them at the time of sale. The court cannot assume this as established, so as to preclude the jury from passing upon it. There is evidence on that part of the case proper for the consideration of the jury. One witness (Kay) has a faint recollection that he saw Donaldson in the door of Parker's store about the time the goods were bought. The other witness does not think that Donaldson did go with him to Parker's on that occasion."

The above is particularly objected to. The point proposed required the Judge to state the law as to what effect Edwards & Verree having possession of the goods or not having possession of the goods, but stating they would or could get them from Parker or Levering or some of their neighbours, and make commission by furnishing them to Donaldson, would have on defendant's right of set-off as offered in this case. It is true, the plaintiff's counsel might more correctly have stated it thus: "If the jury believe from the testimony of Edwards & Verree that they had not the possession of the goods, and told Donaldson so, and that he said this in their store," &c. But the point put was distinctly on the effect of their being in possession of the goods or not on the case. That this will have an effect on the right of set-off by the purchaser, when sued by the owner of the goods, is well settled. The law is well settled in *Smith on Mercantile Law*, 74, 75, (17 *Law Lib.* 45, 46). "When a factor, dealing for a principal, but concealing that principal, delivers goods in his own name, the person contracting with him has a right to consider him to all intents and purposes the principal; and though the real principal may appear and bring an action on that contract against the purchaser of the goods, yet that purchaser may set-off any claim he may have against the factor in answer to the demand of the principal. 7 *Term Rep.* 359, 361; 4 *B. & C.* 551; 3 *B. & Ad.* 334. This rule is to prevent the hardship under which a purchaser would labour, if, after having been induced by peculiar considerations, such, for instance, as the consciousness of possessing a set-off, to deal with one man, he could be turned over and made liable to another, to whom those considerations would not apply, and with whom he would not willingly have contracted. But if at any time in the course of the transaction he have means of knowing that the person with he deals is not a principal, the above reason does not apply, and then *cessante ratio, cessat ipsa lex.* 7 *T. R.* 361;

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1 *East* 335. Thus though if a factor sell goods in his own name the buyer may avail himself of the right of set-off against the factor; yet if a broker do so, the rule will, except under extraordinary circumstances, be different; for a factor who has the possession of goods, differs materially from a broker: the factor is a person to whom goods are consigned, and when he sells in his own name, it is within the scope of his authority, and it is right, therefore, that his principal should be bound by the consequences of such sale, one of which is the right of setting off a debt due from the factor. But the case of a broker is different; he has not the possession of the goods, and so the vendee cannot be deceived by that circumstance; and besides, the employing a person to sell goods as a broker does not authorize him to sell in his own name. If it be said the broker can by this means deceive innocent persons, the answer is decisive, that cannot be unless the principal deliver him the possession of the goods, which is evidence of ownership." 2 *B. & Ald.* 137.

The defendants endeavoured to get clear of this by saying the goods were in possession of Edwards & Verree when delivered to their drayman; but it was proved in this cause that the drayman hauled for others as well as them. The goods were marked, "William Donaldson, Danville, Pennsylvania," and a bill delivered, "William Donaldson, Dr to Samuel Parker." The point put was the effect of Edwards & Verree selling Donaldson's goods not in their possession, which they told him they had not, but could get from Parker or Levering or some other person, and would only make a commission from the owners. The Judge might have put it to the jury to say whether they believed the testimony of Edwards & Verree, but ought to have stated the effect of their evidence if believed. The counsel asked for such opinion, and it was error not to give it. The Judge then proceeded in his answer to this. He says: "The plaintiff has selected a number of detached sentences as proved, or parts of sentences, from the testimony of Edwards, without taking into consideration other portions of the same witness's testimony tending to favour the opposite view of the case; and he then proceeds to select parts of sentences, and a great many of them tending to favour what he calls an opposite view of the case; and concludes by saying these circumstances are not brought into view to influence the jury in their decision upon the facts, but are merely stated as the reasons of the court for refusing to take the cause from the jury, as requested." It does not appear that there was any intention to ask the court to take the cause from the jury, for there were three other points on which the opinion of the court was asked, and each put hypothetically. It is no doubt improper in counsel to ask the court to decide the cause on two or three detached parts of sentences, when there is other and contradictory evidence on that point; but was there any evidence that Edwards & Verree were in posses-

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sion of the goods when Donaldson came to purchase, or were ever in possession of them, as owners? But if it is not proper for counsel to propose their points in this way, it is still more improper in the court to select sentences or parts of sentences tending to a different conclusion. The court may and ought to state that the cause or a point in the cause does not depend on the testimony of any one witness, but on that of all the witnesses; and if the court proceeds to state the testimony of the witnesses, it ought all to be stated, in substance at least; and it has been decided by this court to be improper to state all on one side and none on the other. *Nieman v. Ward*, (1 *Watts & Serg.* 82).

The second point is, in substance, the same, and the answers are to an extent correct. If the effect of *Edwards & Verree* not having possession had been stated, and if the court had stated that the only evidence of what passed between Donaldson and *Edwards & Verree* was to be found in their testimony, the answer would not have been objectionable.

The third point is; "If *Edwards* represented himself to be Donaldson's agent and thereby induced *Parker* to sell the goods to Donaldson on Donaldson's credit only, *Parker*, under the circumstances of this case as proved by the defendant, has a right to recover against Donaldson, whether *Edwards* disclosed to Donaldson the manner in which the goods were obtained or not, or whether he falsely represented to Donaldson that they were obtained on the credit of *Edwards & Verree* or not." The answer is: "This puts the question referred to but not decided in the opinion of the Supreme Court, 2 *Watts & Serg.* 21. It is understood to be assumed in this point that both plaintiff and defendant were deceived by *Edwards & Verree*; that they deceived *Parker* by falsely pretending to be the agents of Donaldson, and thereby obtained the goods; that they deceived Donaldson by falsely pretending they had bought the goods on their own credit from *Parker*, and thereby induced Donaldson to purchase them of them. If these are believed by the jury to be the facts of the case, then there is no contract between *Parker* and Donaldson—and the plaintiff cannot recover in this action, which is founded on an alleged contract. It is impossible to raise a contract between the plaintiff and defendant founded on the transaction with *Edwards & Verree*, if they were agents of neither party. A contract requires the assent of at least two minds; and if Donaldson never made any contract either with the plaintiff or his agents or factors, the plaintiff cannot sustain this action; he must in that case seek redress in some other form of action."

I suspect, neither the counsel nor the court expressed very clearly their meaning. In the point put, the words "*Parker*, under the circumstances of this case as proved by the defendant," must mean, "under the testimony given in this cause." Now, as I have said at the commencement of this business, the only testi-

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mony given is that Donaldson, in the store of Edwards and Verree, saw they had not the goods he wanted; that they told him they had not the articles he wanted, but they could get them from Parker, Levering or some other; and on this he gave a list of the goods he wanted and the prices he was willing to give, and Edwards & Verree went to Parker and got the goods. It is not easy to say Donaldson did not employ Edwards to get the goods. I have cited an authority to show that if the vendor was not in possession of the goods, it was notice that he was acting for another, and the vendee could not receive those goods and when sued set-off an old claim against the agent. Judge ROGERS, when this cause was here before, said: "But when the purchaser at the time of the contract knew that the seller was not the owner of the goods, but a factor, the right of set-off against the factor does not exist, whether the suit be brought in the name of the principal or by the factor in his own name. Nay more, when before all the goods are delivered, and before any part of them is paid for, the purchaser is informed they belong to a third person, he cannot set-off a debt due from the factor." 2 *Watts & Serg.* 21.

Now here, from the testimony, and the only testimony, Donaldson was told and saw that Edwards & Verree had not the goods, but said they would get them and a commission from the owner; this before he gave his bill for the articles. But after the goods were packed and marked and a bill of them given to the agent, charging Donaldson debtor to Parker, this was suppressed by Edwards & Verree and a new bill made and delivered as charging him as debtor to Edwards & Verree. Will this improper act of men he had employed to buy goods discharge him from paying the owner? The difficulty of a seller and buyer and no contract does not arise unless the jury can disregard the testimony of Edwards & Verree totally as to all that occurred between them and Donaldson previous to their going to Parker. If anything sworn to by them is believed, Donaldson did employ them or at least agree that they should go out to buy goods for him. If he did so, and he got the goods, which is admitted, he ought to pay for them, though they after deceived or attempted to deceive him—or attempted by changing the bill of the goods to injure Parker and benefit their employer by enabling him to produce some evidence that he bought the goods from them and not from Parker.

Something was said on the argument about the nature and duties of a broker as understood in London; and it seemed to be assumed that the law in the books referred to was applicable to such a person so designated there, and to no other: but it is immaterial by what name he is designated, whether factor, commission-merchant or broker, if he had not the possession of the goods wanted by a purchaser, but says he can get them and will make a commission from the seller. If the jury believe this is notice to the buyer the man he is talking with is not the owner, and the pur-

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chaser gives a list of such articles as he wants, which are procured and given to the purchaser, such purchaser cannot set-off an account against the man he employed or intrusted, so as to defeat the principal who furnished the goods, when he sues the buyer.

Judgment reversed, and a *venire facias de novo* awarded.

Heckert against Fegely.*

One of the co-defendants, upon whom the process was not served, may be a competent witness for the plaintiff to prove particular facts material to the issue; but he is not competent for the purpose of establishing the fact of a partnership between himself and his co-defendants.

The rule, that all who participate in profits are liable as partners, is subject to many exceptions. If three enter into an agreement, by the terms of which one is to do certain things and the other two certain things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject-matter of the contract, this does not constitute them all partners and make them all liable for expenses incurred by either in the performance of their part of the contract.

ERROR to the District Court of *Lancaster* county.

William Fegely and Reuben Fegely against George Heckert, Matthew Branagan and Thomas Cowen, partners, trading in the name of Cowen, Branagan & Co. The cause was argued by

Park and *Jenkins*, for plaintiffs in error.

Long and *Frazer*, for defendants in error.

The case is fully stated in the opinion of the court, which was delivered by

HUSTON, J.—This was an action of debt on a promissory note, as follows:

\$1309.37

Shamokin, October 25, 1834.

Fifteen days after date we promise to pay to William and Reuben Fegely or order thirteen hundred and nine dollars thirty-seven cents, without defalcation, for value received, and without stay of execution.

(Signed) COWEN, BRANAGAN & Co.

The narr. is a single count in debt on this note. The writ was served on George Heckert alone. The other defendants did not live in the county. The plaintiff gave in evidence the following lease and agreement:

* This case was argued at an adjourned court held at Lancaster in August 1843.

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Memorandum of an agreement entered into the 4th day of March 1839, between George Heckert and Matthew Branagan and Thomas Cowen, as follows, viz.:

The said Heckert leases to the said Branagan & Cowen, for and during and until the end of the next ensuing coal season, the coal mines now opened at Buck Ridge, called respectively, No. 1, 2, 3 and 4, upon the following terms, viz.: The said Heckert is to furnish the necessary drift-cars, drift-rails and slabs, and the necessary iron for the drift-roads. He also leases for the same time, without receiving rent, all the dwelling-houses, stable and blacksmith shop at Buck Ridge, with authority to notify and dispossess any or all of the present tenants or occupants of the said buildings. The said George Heckert will also undertake to furnish the funds necessary to conduct the said coal business during said time; he will also cause to be built, as soon as may be, the wharf and schute for the eastern two mines and drift railroads from the schute into the said mines; he will also cause the main railroad to be extended sufficiently far to place a train of empty cars upon for the convenience of loading.

The said Branagan & Cowen will, at their own expense, drive the gangways of the said mines, mine the coal, cut and furnish themselves with all necessary timber off of the company's lands; and do and perform and supply themselves with all other necessary things for successful mining, and deliver the coal in wagons at the foot of the Buck Ridge Company's road on the level next the turnout from the Danville and Pottsville railroad. Branagan & Cowen will accept, at a valuation to be made by William Fegely and Kimber Cleaver, such of the company's implements and tools as may be now offered them for sale; they will also accept at cost the gangways already driven and now standing in coal from where they break off the first breast, they receiving the coal that came out of the drifts and is now lying on the banks; they will indemnify and save harmless the said Heckert from all breakages and damages happening to the Danville and Pottsville Railroad Company's cars off of their road. The said Branagan & Cowen are to perform all their services and bear all their outlays and expenditures at one dollar per ton for the coal delivered in cars at the foot of the plane and level aforesaid. The said Heckert is to do and perform the several matters and things herein specified, and to sell the coal to the best advantage, and collect the proceeds at fifty cents per ton; and if the market price of coal, after deducting rent, railroad and canal or river transportation, does not afford these sums, then there is to be a mutual deduction from said sums; if, on the contrary, the market price, as aforesaid, should afford larger sums or dividends, then there is to be a mutual increase added. The rate of increase or diminution shall be as follows: two-thirds to Branagan & Cowen and one-third to Heckert. If any difference should arise as to the true construction of this

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agreement, such difference is to be referred to Kimber Cleaver, whose decision thereon shall be final and conclusive between the parties.

The weight of coal shall be gross weight, and is to be ascertained by the weigh-master at Sunbury. The timber is to be cut in Buck Run ravine, at such convenient places as the said Heckert may point out. In witness whereof the said parties have hereunto set their hands and seals this 4th day of March 1839.

Witnesses:

BENJAMIN UPDEGRAFF,
KIMBER CLEAVER.

GEORGE HECKERT, [SEAL]
MATTHEW BRANAGAN, [SEAL]
THOMAS COWEN, [SEAL]

The defendants had under our law and practice given notice to the plaintiffs to produce their books, and all orders and drafts given to the plaintiffs by the defendants or either of them singly or by two of them in pursuance of this rule. The books were produced and showed a long account against Matthew Branagan; also an account against Thomas Cowen; also an account against Branagan & Cowen; also an account against Cowen and Branagan; also orders drawn upon Messrs Fegely by Thomas Cowen & Co.; also orders drawn on same by Cowen & Branagan; also, by Thomas Cowen alone; also, by M. Branagan & Co. Not one charge against Cowen, Branagan & Co. or against Branagan, Cowen & Co.; nor were orders drawn in these names. Only the note in question and two others dated since were drawn as this note is. It was also proved that *the note in suit was composed of the aggregate of all these accounts*. Also, that Cowen & Branagan had separate families; one lived at the mines and one at Shamokin, a mile off; that each kept boarders. The articles charged were for provisions, groceries, dry-goods, &c. It also appeared that a day or two before this note was given, Cowen & Branagan drew an order on Heckert for about \$1000, which he refused to accept. Joseph Snyder proved that in October 1839, in conversation with Heckert respecting the coal business and price of coal, Heckert, after stating the price at which it was selling, said, if they could sell their coal and make seventy-five cents clear, it would be a good business. He said, "there were three of them in partnership, and if they could clear twenty-five cents a-piece on eight or ten thousand tons sent down in a season, it would be making a good summer's work. Who were the partners he did not say; nor did I ask him. I then replied to Mr Heckert, I thought the Fegelys would come out behind with Cowen & Branagan. He said, no; he had the coal in his possession, and he would be bound to see the Fegelys paid. We dropped the subject." Ziba Bird said, Branagan and Cowen had given him an order on Heckert, who refused to accept it at that time; for that he had made an engagement to settle other accounts of the Messrs Fegelys. This was in October 1839.

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The plaintiff offered the deposition of Matthew Branagan, taken on notice under a rule of court, which was objected to, admitted, and a bill of exceptions.

The deposition is as follows: "That he was one of the firm of Cowen & Branagan & Co. mining coal at Buck Ridge, near the town of Shamokin, in Northumberland county and State of Pennsylvania in the year 1839. That the said firm paid the miners and other men employed at mining said coal by orders on William & Reuben Fegely, and the said firm also received of the said William & Reuben Fegely sundry merchandise, oil and some money, all of which was applied in carrying on said mining operations, and that they received in manner above stated to the full amount of the certain promissory notes in favour of William & Reuben Fegely, signed Cowen, Branagan & Co. The deponent signed these notes himself, and the "& Co." was written at the same time the notes were given. The deponent was continually employed during said mining and shipping, either working at the mine aforesaid, or at Sunbury, loading coal into boats. The said firm mined during said season, and shipped to George Heckert of Lancaster, who was one of the parties, or to such places as he directed, about 4600 cars of coal, of which the said Heckert was to collect the proceeds, and divide, according to the agreement, between me and Thomas Cowen and the said Heckert, each their just share thereof; which he, the said Heckert, has failed to do. The deponent further saith, that the said firm paid William Glover for labour done, unloading coal on the wharf at Sunbury, with an order on William & Reuben Fegely. That the whole expenses of the mining operations of the said firm from the Buck Ridge mines was taken out of the plaintiffs' store either in money or orders, or in goods, except some money that Mr Heckert advanced at first, and that if the plaintiffs had not agreed to furnish the means of carrying on the business as they did, we could not have carried on at all, for Mr Heckert did not supply the funds as the articles of agreement called for, and he knew that we were getting funds in this way from the plaintiffs. That the whole amount called for on the face of the three notes, on which these suits have been brought, is due from the firm to the plaintiffs. And further saith not."

There is supposed to be some contrariety in the decisions as to whether a partner can (although not sued) be a witness in a case in which the firm is one of the parties. It will be found this depends on the circumstances and purpose for which such testimony is offered. The plaintiff, in a suit against the firm in a case where the co-partnership is unquestionably proved or admitted, may prove his declarations, or, if he agrees, examine him to prove the settlement of accounts or delivery of the goods; but where the existence of the partnership is denied, and is the principal matter in contest, one who is clearly liable is not a witness to discharge

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himself, by proving that another is liable for the debt or part of it; he is swearing directly in favour of his own interest. Branagan & Cowen were by the articles of agreement "to perform all their services and bear all their outlays and expenditures at one dollar per ton for the coal delivered in cars at the foot of the plane and level aforesaid." This is even stronger than the case of *Purviance v. Dryden*, (3 Serg. & Rawle 406). His deposition ought not to have been admitted.

The next question arose on an exception to the opinion of the court to the plaintiffs' third point, "that the articles of 4th March 1839, entered into by George Heckert, Matthew Branagan and Thomas Cowen, and given in evidence in this cause, constituted a partnership, and render them liable for the partnership debts." This was answered in the affirmative, at least so far as respects third persons; and renders them liable for the partnership debts contracted for carrying on the partnership concern.

There was a time when the common law, or at least those who administered it, were fond of general rules; but general rules can never be safely applied to transactions founded on different circumstances, nor to engagements in which the duties, advances, labours and agreements of parties are essentially different from each other. The general rule that all who share in profits are liable as partners, has long been subject to many exceptions. The owner of a lighter, instead of hiring a captain and hands, agrees to furnish the vessel with one who is to furnish hands to work the vessel: this does not make them partners. It is very usual, in this State, that the owner of a farm leases it to a farmer who is to find ploughs, harrows, wagons, &c. and food for his hands and horses, and the produce of the farm to be equally divided. No one has yet said the landlord was liable for horses, &c. or provisions purchased by the farmer. The real question is, was G. Heckert, on the face of this lease and agreement, liable for the pay to the miners employed by Branagan & Cowen, and for the provisions and boarding of those hands, and for the groceries, dry-goods and food of the families of Branagan & Cowen? Was such the intention of the parties to the agreement of 4th March 1839, or is the effect of that agreement such as to render Heckert liable to the plaintiff who furnished those articles which are the consideration of the note in question.

As to the first question the agreement is plain and express, Branagan & Cowen were to perform all services and bear all outlays. In another part, "Branagan & Cowen will, *at their own expense*, drive the gangways of the said mines, mine the coal, and supply themselves with all other necessary things for successful mining, and deliver the coal in wagons at the foot of the Buck Ridge Company's road on the level next the turn-out from the Danville and Pottsville Railroad." They were to accept at a valuation such implements and tools as were offered to them for sale. Heckert leased them the mines, houses, &c. without

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charge; was to furnish funds to conduct the coal business during the season, (it seems agreed this means he was to advance the necessary money and be remunerated out of the proceeds of coal sold), and he was to cause to be built a wharf and schute for the two eastern mines, and drift-railroads, to extend the main railroad, for conveniency of loading, &c. &c. Thus it is specifically agreed what each party is to furnish and do — equivalent to what each shall put into the concern. If Heckert had to borrow money to do his part, clearly Branagan & Cowen were not to be liable for this. So, if they borrowed money to pay their hands, or to buy provisions, or went in debt for these things, he is not answerable. It is expressly agreed what each party shall do and pay, until the coal is in the cars; and each, so far, was individually to receive pay for him and themselves. It is, in principle, precisely the case of *Loomis v. Marshall*, (12 Conn. 69); see also 14 Pick. 192; 18 Wend. 175; *Story on Part.*, sects. 34 to 52; *Cary on Part.* 8, 9, 10.

But men may be liable as partners to third persons, though not partners as between themselves. This may be, among other cases, where they hold themselves out as partners and credit is given to them as such. Was that the case here? The books and charges are against M. Branagan alone, Thomas Cowen alone, or against them B. & C. or C. & B. (this evidently because one lived in town and the other at the mines, to show what went to each of those places); but no charge against them and Heckert, or B., C. & Co., until this note. I suppose it to be clear, that if men agree to become partners, and one borrows money to enable him to put in his proportion of the capital agreed on, the firm will not be liable for this; and if after the company is in operation that man gives the note of the firm for this debt, it will not alter the case. So if each is to pay in every six month, *e. g.* \$500, and one borrows for himself this \$500, the firm is not liable, unless it was lent on the credit of the firm by one who did not know it was for the use of the individual to whom he lent it. In this case Cowen & Branagan, who as between themselves were partners, were to furnish and support the labourers; this in consideration of Heckert furnishing and doing certain things. If the Messrs Fegelys knew and understood this, how can they now claim from one not liable for this debt by the articles of agreement, or the intention of the parties to it, and not supposed liable when the credit was given? for it will not be in the usual course of business to charge goods for six months to any but those who are supposed liable, or to charge them to one of a firm or to two of a firm, if it is intended to hold all liable: but somehow or other this may be explained. It must, then, be submitted to a jury to whom the credit was given. It will be observed that the neighbours, Snyder and others, did not consider Heckert liable; that is, it was not considered at Shamokin that he was a partner. If he did make any agreement to see the plaintiffs paid, he must be sued on that agreement. That, if proved, will not

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make him liable as a partner; it may tend to show he was not considered by the Fegelys to be liable as a partner.

It was much debated whether, if this note was not recoverable in whole, any part of it can be recovered. As this cause goes back, this point may not be material, for other counts may be added and a recovery of part on them, if any is due, as in *Robinson v. Bland*, (2 Burr. 1082), where there were three counts. The law seems to be, if a bond is given with several conditions, some good and some bad, it may be good in part; but if a bond is given to do a thing or for having done a thing forbidden by Act of Parliament and also to pay a just debt, the whole bond will be void, because the Act of Parliament makes it so. *Hobart* 14; 2 *Lord Raym.* 1459. But unless the Act of Parliament expressly enact that all securities and instruments which contain or are given for matters contrary to the Act shall be void, so much only of such securities and instruments as are contrary to the Act, shall be avoided, and the rest shall stand good. See *Gaskell v. King*, (11 East 165); *Howe v. Synge*, (15 East 441); *Fuller v. Abbott*, (4 Taunt. 105). This seems to be the modern doctrine, and such as has been acted on in this State, where, though taking more than six per cent. per annum for money is prohibited and made penal, yet the bond or note has not been declared void, and on it the debt and legal interest has been recovered.

Judgment reversed, and a *venire de novo* awarded.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT, DECEMBER TERM, 1843.

Schuylkill Bank *against* Macalester.
Same *against* Wager.

A discontinuance can only be entered by leave of the court, and though the practice is to do it without such leave first granted, yet the court on cause shown will refuse leave after it has been entered.

Sureties in a bond of indemnity have a right to require the obligee to bring suit on the bond in case of a breach, and if such suit is begun and there is a fund of the principal's to pay the debt, the court will refuse leave to discontinue, where a rule of reference has been taken out by the defendant, though the arbitrators had not been appointed when the discontinuance was entered.

IN these cases actions of debt were respectively instituted in this court by the Schuylkill Bank in the city of Philadelphia against Hosea J. Levis & Charles Macalester, and Hosea J. Levis & Peter Wager on two bonds for \$10,000 each, in which Macalester & Wager were sureties for the faithful performance by Levis of his duties as cashier of that bank. The writ was returned served on Macalester & Wager and *nihil habet* as to Levis. The defendants entered a rule of reference. On the morning of the day fixed for the appointment of arbitrators, and before they were appointed, the plaintiffs filed a discontinuance and paid the costs

[Schuylkill Bank v. Macalester — Same v. Wager.]

in each suit. The arbitrators were, notwithstanding, appointed, (the prothonotary acting for the plaintiffs) and were about to proceed, when a rule was taken by the plaintiffs to show cause why the appointment of arbitrators and the subsequent proceedings should not be set aside. The arbitrators subsequently made an award for the defendants.

It appeared that Hosea J. Levis made a voluntary assignment for the benefit of creditors, in which there was a preference to indemnify his sureties. The assignee reported assets sufficient to pay all claims upon the estate of the assignor and a surplus. Auditors were appointed by the Common Pleas to settle the first and second accounts of the assignees. The Schuylkill Bank appeared before both audits, desiring it should be particularly noticed that they only appeared as claimants for what they called the "Bethel Fund," and appeared as claiming in no other capacity. They claimed the "Bethel Fund" independently of the assignment, but nothing under the assignment. The plaintiffs were notified by the counsel for the sureties as to the time of the meetings of the auditors, before whom they were required to produce the bonds in question, and to show what claim, if any, they had against the sureties in the bonds; with a proviso that the notice was not to be construed as an admission by the sureties of their liability on the bonds. They subsequently received notice to appear and substantiate their claims, if any they had, against the sureties, as there was a fund in the hands of the assignees for distribution, and the first preference in the assignment was to protect the sureties from loss by reason of their suretyship in the bonds. The plaintiffs were further notified that on their failing to comply with this requisition, the sureties would hold themselves discharged from liability to the plaintiffs on the bonds. To the last notice the bank answered that suit had been instituted by them against the sureties in the Supreme Court, that they regarded it as incumbent on Macalester and Wager, as sureties, to require of the assignees and to ask of the auditors that any funds which might under the assignment be applied to the indemnity of the sureties, should be retained until the claim of the bank on the sureties in the suits at law were determined, and that the bank did not consider itself bound to submit its claim to any other than the tribunal it had chosen.

Henderson and Dallas, for the plaintiffs, now showed cause why the appointment of arbitrators, &c. should not be set aside; and contended that the plaintiffs had a right to discontinue, on payment of costs, at any time before the appointment of the arbitrators, though a rule of reference had been previously taken out by the defendant and duly served. The jurisdiction of the court is not divested until the appointment of arbitrators. *Camp v. Bank of Owego*, (10 Watts 130). In *Mechanics' Bank v. Fisher*, (1 Rawle

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341), relied on by the defendants, the discontinuance was not allowed, because it tended to harass the defendant, and it was entered by the prothonotary's clerk without any authority. A plaintiff may discontinue after judgment by default before a writ of inquiry. 1 *Miles* 158; 2 *Arch. Pr.* 208; 2 *Sel. Pr.* 335. In 6 *Cow.* 385, a verbal discontinuance was held sufficient; and in 12 *Wend.* 191, a plaintiff was allowed to discontinue without payment of costs.

The refusal of the plaintiffs to go before auditors and claim out of the assets in the hands of the assignees, after notice to them by the sureties to do so, discharges the sureties entirely, and they are protected by these circumstances for ever from liability, without insisting on an award or judgment in their favour.

Randall, for the defendants, was stopped by the court.

PER CURIAM.—A right which can be exercised only by permission, is no right at all; and all the cases show that a discontinuance must be founded on the express or implied leave of the court. In England this leave is obtained on motion, in the first instance; and here it is taken without the formality of an application, but subject to be withdrawn on cause shown for it: that is the whole difference. The act, when the propriety of it is contested, must, in the one shape or in the other, have the sanction of the court. Are the circumstances of this case, then, such as to demand our interference? Messrs Wager and Macalester are sureties, and consequently entitled to require that the suit be prosecuted to a conclusion, not only to put them out of suspense, but to give them the ulterior benefit of the judgment as a security. Had the plaintiffs not brought suit, they would have had a right to say, "begin;" but, having begun, they have perhaps a greater right to say "go on;" for it would be a fraud on them to put their vigilance asleep by the institution of an action, subsequently withdrawn, which would cause them to lose just so much time. The plaintiff admits that the sureties are discharged in equity, not only by the discontinuance, but by the existence of a fund within their reach in the hands of the principal's assignees; and why not give up the evidence of the debt? The sureties have a right to be discharged not only in equity but at law. The plaintiff is therefore bound either to enter a *retraxit*, which would make an end of their legal liability, or proceed to judgment in order to have the money which awaits the sureties' order in the hands of the assignees, paid into court and satisfaction entered. These are considerations which compel us to say he must proceed.

Rules discharged and discontinuance set aside.

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Phillips against Lawrence.

Damages arising from a breach of warranty of goods sold may be set-off in an action on a note given in a different transaction.

ERROR to the District Court for the city and county of *Philadelphia*.

This was an action on the case brought by — Lawrence & — Robinson, trading as Lawrence & Robinson, against John Phillips & Daniel P. Bussier, trading as Phillips & Bussier, on the following promissory note:

\$1539.78.

New York, 6th Dec. 1841.

Four months after date we promise to pay to the order of Lawrence & Robinson fifteen hundred and thirty-nine dollars and seventy-eight cents, value received, at the office of Wycoff & Scrymser.

PHILLIPS & BUSSIER.

The defendants filed the following affidavit of defence:

"John Phillips, one of the defendants above-named, being duly sworn according to law, deposes and says that there is a defence in part to the claim of the plaintiff in the above action; the nature and character of which defence are as hereinafter set forth.

"On the 6th August 1838, the defendants purchased a quantity of walnuts, to wit, 201 bags, from the firm of Chamberlain, Broom & Co., at that time carrying on business in the city of New York, which firm was composed of William Chamberlain, Samuel Broom and — Lawrence. The purchase was made by sample, the article to correspond in description and quality with the walnuts exhibited as samples. The 201 bags of walnuts were shipped by the said Chamberlain, Broom & Co. to the defendants at Philadelphia, landed from the vessel and put in store. The defendants commenced making sales of the same in various quantities and to various individuals. After some sales had been effected, complaints were made by some, if not all of the purchasers, of the inferior quality of the nuts, and, in some instances, the same were returned to defendants on that account. An examination was then made of the whole parcel of nuts, when full one-half of the same proved to be rotten and worthless, and of a different mark from what was exhibited as samples at the time of the purchase. A demand was then made by this deponent in person, for an allowance on said bill of nuts, on said Chamberlain, as one of the firm of Chamberlain, Broom & Co., who stated that one of his partners, Mr Samuel Broom, was then absent in Europe, and when he re-

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turned, if he, Broom, was willing, they would make the proper allowance; the samples having been shown by Broom. After receiving this assurance the matter rested until some time in February 1839, when a demand was again made for an allowance, but without success. This deponent avers that the defendants have not been able to dispose of more than one-half of said nuts. That about one-half of said 201 bags were not according to the samples produced, but were of an inferior quality and of different marks. That the same were not a sound and merchantable article, but rotten and of no value whatever. The loss sustained by the defendants they estimate at from \$400 to \$500, which sum they claim as a set-off against the demand of the plaintiffs in the above action.

"This deponent further states, that he was informed by the aforesaid William Chamberlain and others, that at the time the note on which suit is brought was given, the firm of Lawrence & Robinson, to whom the note was given, consisted of the aforesaid — Lawrence, — Robinson, and the aforesaid William Chamberlain. And he has also been informed, and verily believes, that before the commencement of this suit, said Robinson ceased to have any interest in said note, having retired from said concern, and the partnership of Lawrence & Robinson having been dissolved before the maturity of said note, said Robinson has in fact stated, within five days, that he knew nothing of any proceedings on said note.

"He further states, that he has been informed and verily believes, from inquiries made since the commencement of this suit, that the parties interested at this time and at the commencement of this suit, in the note on which the action is founded, are the said — Lawrence, one of the above-named plaintiffs, the aforesaid William Chamberlain, and Samuel Broom, being the same parties who composed the firm of Chamberlain, Broom & Co., from whom the said parcel of nuts was purchased; said Robinson not being in any way interested in said note, although his name is used as one of the nominal plaintiffs."

The court entered judgment for the plaintiffs for want of a sufficient affidavit of defence, and damages were assessed at \$1553.72.

Errors assigned :

1. In entering judgment for want of a sufficient affidavit of defence, when there was a sufficient affidavit of defence on the record.

2. In deciding that the facts set forth in the affidavit of defence, were not sufficient to entitle the defendants below to a trial by jury.

3. In deciding that the facts stated in the affidavit of defence would not, if proved before a jury, have been a full defence to this suit.

Meredith, for the plaintiffs in error, contended that the court

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below erred in entering judgment, by which the claim of the defendants to a set-off was rejected, when they were entitled to go into it before the jury as a defence. It is not such a case of unliquidated damages as is inadmissible as a set-off; for the demand being founded on a warranty, arises *ex contractu*, and there is a measure of damages, viz., the difference between the price paid and the value of the article delivered in an unsound state. There is no reason why such a defalcation should not be allowed under the Act of 1705; and the cases of *Steigleman v. Jeffries*, (1 *Serg. & Rawle* 477); *Bayne v. Gaylord*, (3 *Watts* 301); and especially the case of *Nickle v. Baldwin*, (4 *Watts & Serg.* 290), go to sanction it.

Guillou, contra. The rule uniformly received is, that only demands for damages arising out of the same transaction are the subject of defalcation, and not those which are founded on a distinct and independent bargain. There must be an immediate connection with the plaintiff's cause of action. *Gogel v. Jacoby*, (5 *Serg. & Rawle* 122); *Dunlop v. Speer*, (3 *Binn.* 169); *Heck v. Shener*, (4 *Serg. & Rawle* 260); *Foster v. Bell*, (2 *Miles* 399). Here the alleged bargain about the walnuts had no connection whatever with the note on which the present suit was brought. In *Bayne v. Gaylord* the extra work was thrown out, and the decision went on the claim for the original work. The decision in *Nickle v. Baldwin* turned on the Act of 20th March 1810, which requires a set-off by the defendant before a justice of the peace of all "damages on assumption."

The opinion of the Court was delivered by

KENNEDY, J.—The defendants below are the plaintiffs in error, and offered, as a defence to a part of the plaintiffs' claim, to defalcate a demand which they, as appears by the affidavit of one of them, filed in the action as a defence in part to the plaintiffs' claim, alleged they had against the plaintiffs, arising out of a contract made and executed by and between them, whereby the plaintiffs sold and delivered to the defendants, in the month of August 1838, 201 bags of walnuts, warranting them to be of a quality equal to samples thereof shown at the time. The defendants, however, by the affidavit filed, allege that about one-half of the walnuts so sold and delivered were of an inferior quality to that of the samples, also of different marks from the samples, and in short that they were rotten and of no value whatever; by reason whereof they, the defendants, sustained a loss equal to from \$400 to \$500. The court below were of opinion that the demand or claim thus set up by the defendants below against the plaintiffs there, could not be set off or defalcated under our Defalcation Act, and accordingly rendered a judgment against them for the whole amount of the plaintiffs' demand. In this it is alleged that the court erred. The

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only question, therefore, which presents itself, is, whether the defendants had not a right to set off their demand against the plaintiffs on account of their having delivered to them under the contract for the sale thereof, walnuts of an inferior quality and greatly less value than what, by the terms of the contract, they had undertaken and bound themselves to do.

In order to determine this question, it is proper to refer to the terms of the Act for defalcation, which are, that "if two or more dealing together be indebted to each other upon bonds, bills, *bargains*, promises, *accounts*, or *the like*, and one of them commence an action in any court of this Province (Commonwealth), if the defendant cannot gainsay the deed, *bargain* or *assumption* upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or *sum* demanded, and give any bond, bill, receipt, *account* or *bargain* in evidence, &c." Now, that the demand of the defendants against the plaintiffs is founded upon a bargain alleged to have been made between them, is clear from the terms of the affidavit of defence, and therefore within the express terms of the Act; so that one might naturally be led to conclude that the defendants' demand came within the spirit and meaning of the Act, as well as the letter of it, unless indeed it should be found from experience to be impracticable to give to the Act such an operation, or be found contrary to the general purport of the Act as expressed in the other parts of it. But this has not been shown, and, I think I may add, not even attempted. The only objection made is, that the claim of the defendants sounds wholly in damages of an unliquidated nature. If by this it is meant that the damages claimed by the defendants of the plaintiffs for the breach of their contract of warranty, are not such as may, and I will say, must be ascertained by the jury from evidence to be adduced by the defendants, showing the amount of their loss in dollars and cents, as it were, the objection is not correct; for it will be necessary that the defendants prove to the satisfaction of the jury the actual amount of their loss, and what it is equal to in dollars and cents; beyond the amount so proved, the jury cannot go or allow the claim of the defendants. The value or amount of the loss in such case may be quite as easily ascertained by a jury from the evidence with exactness, as the value of goods sold and delivered upon an *account in assumpsit* to recover what they may be proven to be reasonably worth; yet I apprehend that no person would say that a claim for the price of the goods in this latter case could not be set off by the seller in an action brought against him by the vendee on a bond, bill or note. For a claim upon an *account* is expressly recognised and mentioned in the Act.

The case, then, under consideration is clearly "a case of damages," as Mr Justice SERGEANT well observes in *Nickle v. Baldwin*, (4 *Watts & Serg.* 292), "arising *ex contractu*, capable of liqui-

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dation by a legal standard, and therefore falling within the Defalcation Act, as well as within the express language of the 7th section of the Act of the 20th of March 1810, by which the defendant is required, in a suit before a justice of the peace, on pain of being for ever barred, to set off his demand, whether founded on bond, note, penal or single bill, writing obligatory, book account, or *damage on assumption*." Indeed, it is plain that the decision of the case just referred to, and the principles laid down in it, rule and govern the present case. It may be that that case was considered as coming more directly under the provisions of the 7th section of the Act of 1810; but then it serves to show clearly the extent to which the Legislature considered that the right of set-off might be carried in all cases; and that if a defendant in a suit brought against him before a justice of the peace did not choose to exercise or avail himself of it, he should for ever thereafter be debarred from recovering such claim as he was allowed to set off. Wherever the nature of the case is such that a jury, in assessing damages in favour of the party claiming them, are fairly at liberty to take into consideration the mental suffering of such party produced by the conduct of the opposite party, or with a view to promote the peace and quiet of society, and to protect every one in the full enjoyment of his rights, they are at liberty to give vindictive or exemplary damages, the damages in such cases may with propriety be called unliquidated, and may perhaps be considered the subject of set-off under our Defalcation Act; but of this I do not wish to be understood as giving any definitive opinion. But I can entertain no doubt that the Defalcation Act allows a defendant to set-off a demand such as the defendants allege they have in the present case against the plaintiffs, arising out of a bargain or contract, where, although the sum claimed, legally speaking, consists of damages, and cannot be reduced to certainty by the terms of the bargain itself, yet the law has fixed and given a standard by which it can be ascertained by a jury of the country. The thing is not only practicable, but it is just and equitable that it should be so; for there is no reason or justice in compelling a defendant to pay a debt or sum of money owing by him to the plaintiff, when the plaintiff is owing, at the time of suit brought, to the defendant, a debt or sum of equal or greater amount, or, if of less amount, without having it defalked. It may also be further remarked, that this construction of the Act naturally tends to promote the interest of the public, as well as that of the parties, by preventing a multiplication of suits, putting an end to litigation with as little delay as possible, and thus avoiding all that additional expense and waste of time that would otherwise be necessarily incurred.

Judgment reversed, and record remitted with a *procedendo*.

Carman against The Franklin Fire Ins. Company.

The defendant under the Act of Assembly may not only defalcate a claim founded on the contract on which the plaintiff sues, but one arising from breaches of other contracts.

Breach of a contract by the plaintiff producing loss to the defendant, is sufficient consideration to sustain the defence of set-off or defalcation.

ERROR to the District Court for the city and county of *Philadelphia*, in which suit was brought by the Franklin Fire Insurance Company of Philadelphia against William Carman, on the following note:

\$2800

January 26th 1841.

On demand I promise to pay to the order of Franklin Fire Insurance Company of Philadelphia, two thousand eight hundred dollars, without defalcation, for value received, with interest.

WILLIAM CARMAN.

The defendant filed the following affidavit of defence:

"William Carman, the above defendant, being duly affirmed, saith, that there is a defence to the plaintiff's claim in the above suit of the following nature and character, to wit: in January 1841 the above plaintiff held two mortgages for the sum of \$8500 on defendant's property in New Jersey, the bonds accompanying which were entered up in the city of Philadelphia and bound deponent's property in this city and county. Deponent was desirous of releasing his property in the city and county of Philadelphia from the effects of these two judgments, to wit, one of \$10,000 and one of \$7000, both in favour of Jacob Ridgway and both entered up on the 8th of April 1837; and in order to accomplish it, he agreed with the above plaintiff, who then owned the said bonds, mortgages and judgments, that if they would assign and transfer the same, together with the policies of insurance which accompanied the mortgages, to any one who would purchase the same, and would loan deponent \$2800 of the said money on his, deponent's, note and sixty-two shares of United States Bank stock which they held, he, deponent, would raise the amount of the said bonds and mortgages and pay it to them. This the above plaintiff agreed to do and to transfer the said policies of insurance. Deponent, on the faith of this agreement, procured a purchaser for the said bonds and mortgages of \$8500, for a premium of \$850, which deponent paid and the said plaintiff received the full amount, principal and interest due on said bonds and mortgages, and transferred the same to the purchaser. They also loaned deponent \$2800 of

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the money and took his note, which is the one of which a copy has been filed in this suit, and held deponent's stock. But they have refused and still do refuse to transfer the said policies of insurance on the property bound by said mortgages and which accompanied the same, in consequence of which the purchaser of the said bonds, mortgages and judgments refuses to enter satisfaction on the said judgments or to release deponent's property in the city and county of Philadelphia from the effects of the same, and deponent has no means of compelling him so to do till plaintiff transfer to him the said policies. The purchaser of the said bonds, mortgages and judgments agreed with deponent to enter satisfaction on the said two judgments, on receiving from the said plaintiff a transfer of the said policies, bonds, mortgages and judgments and is now ready and willing to do so on receiving a transfer of the said policies; but by the refusal of the said plaintiff to comply with that part of their agreement and to transfer the said policies of insurance, deponent's property in the city and county of Philadelphia continues bound by the said two judgments and he is thereby prevented from either selling the same or raising money upon it and is subjected to great loss and inconveniences. Deponent is the owner of valuable real estate in the city and county of Philadelphia, which continues bound by the said two judgments in consequence of the plaintiff's refusal to comply with their agreement, none of which is he able to sell owing to the said judgments remaining unsatisfied and for some of which he has an application at this very time and is desirous of selling. The loan of the \$2800 and the giving the promissory note in question was a part of the original contract with said plaintiff, and by their not complying with their part of the said contract, deponent has lost the said \$850 which he paid as a premium on the sale and transfer of the said bonds and mortgages, besides the loss and inconveniences which he has suffered by having his property in the city and county of Philadelphia bound by the said judgments."

The court entered judgment for want of a sufficient affidavit of defence.

Errors assigned :

1. The court erred in giving judgment in favour of the plaintiff notwithstanding the affidavit of defence.
2. In deciding that the fact stated in defendant's affidavit of defence did not entitle him to a jury trial.
3. In deciding that the facts stated in defendant's affidavit could not be given in evidence by way of defalcation or set-off in this suit, and could not prevent the plaintiff's recovering the face of the note and interest.

Perkins, for the plaintiff in error, contended that the claim of the defendant, being part of the original contract, was properly the subject of set-off. *Steigleman v. Jeffries*, (1 Serg. & Rawle "

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477); *Heck v. Shener*, (4 *Ibid.* 249); *Shaw v. Badger*, (12 *Ibid.* 275); *Bayne v. Gaylord*, (3 *Watts* 301); *Nickle v. Baldwin*, (4 *Watts & Serg.* 291); *M'Fadden v. Irwin*, (2 *Whart.* 37); *Hubler v. Tumney*, (5 *Watts* 51); *Harper v. Kean*, (11 *Serg. & Rawle* 280).

T. I. Wharton, contra.

The alleged agreement was without consideration. The affidavit states no loss or injury to the defendant or benefit to the plaintiff; or if it does, it is too remote. The affidavit is defective also in not alleging any agreement to enter satisfaction.

The defendant should have brought his action; his demand was not a subject of defalcation. The rule allowing unliquidated damages to be set-off ought not to be extended. The claim of the defendant does not arise out of the original transaction, as in the cases cited by the plaintiff in error, but out of a transaction altogether distinct, and it is, therefore, not the proper subject of defalcation. *Gogel v. Jacoby*, (5 *Serg. & Rawle* 122); *Cornell v. Green*, (10 *Ibid.* 14). The case of *Nickle v. Baldwin* was decided under the Act of 20th March 1810.

The opinion of the Court was delivered by

HUSTON, J. — The Insurance Company brought suit on a note given by Carman to them for \$2800. The suit was between the payer and the payee. The Act of 28th March 1835 has declared, in the 2d section, that in all actions instituted in said court on bills, notes, bonds or other instruments of writing for the payment of money, &c. it shall be lawful for the plaintiff, on or at any time after the third Saturday succeeding the return day, on motion, to enter a judgment by default, notwithstanding an appearance by attorney, unless the defendant shall previously have filed an affidavit of defence, stating therein the nature and character of the same.

Notwithstanding the affidavit of defence, the court ordered judgment for the plaintiff, and the defendant sued out this writ of error. That court gave no reasons for its decision. The errors assigned are: "1. The court erred in giving judgment for the plaintiff notwithstanding the affidavit of defence. 2. In deciding that the facts stated in the defendant's affidavit did not entitle him to a jury trial. 3. In deciding that the facts stated in the affidavit could not be given in evidence by way of defalcation or *set-off* in this suit, and could not prevent the plaintiff's recovering the face of the note and interest." The words, "or *set-off*," in the third assignment of error are at least useless; for *set-off* it was not, in the legal and English sense of the word. The English courts had decided that what is known as an equitable defence could not be made at law to a negotiable note or any evidence of debt under seal. The defendant must suffer judgment to pass on the law side, and then apply to a chancellor for relief.

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A Court of Chancery was never regularly authorized or organized in this State, although some proceedings in that court seem to have been commenced; but as early as 1705 an Act was passed; "If two or more dealing together be indebted to each other upon bonds, bills, *bargains*, promises, accounts or the like, and one of them commence an action in any court of this province, if the defendant cannot gainsay the deed, bargain or assumption upon which he is sued, it shall be lawful for such defendant to plead payment of all or part of the debt or sum demanded and give any bond, bill, receipt, account or bargain in evidence; and if it shall appear that the defendant hath fully paid or satisfied the debt or sum demanded, the jury shall find for the defendant, &c. And if it shall appear that any part of the sum demanded be paid, then so much as is found to be paid shall be defalked, and the plaintiff shall have judgment for the residue only, with costs of suit." It then proceeds to direct what shall be done if the plaintiff is overpaid.

More than fifty years ago it was decided that under the plea of payment with leave to give the special matter in evidence, the defendant might give in evidence anything which went to show that the plaintiff ought not to recover the whole or part of his demand. It was also settled that this Act went beyond the English statutes of set-off. The word "*bargain*," there introduced into the law, showed clearly that an agreement not completed might be considered by the jury: and this has been always held to apply to any stipulations expressed or implied in the contract on which the plaintiff's claim was founded; *Steigleman v. Jeffries*, (1 *Serg. & Rawle* 477); *Heck v. Shener*, (4 *Ibid.* 249); and many other cases cited in the argument. In *Nickle v. Baldwin*, (4 *Watts & Serg.* 290), and in one or two cases at this term, this court went further, and it was extended to breaches of other contracts than those out of which the plaintiffs' claim arose.

The defendants' counsel stated there was no consideration. This was not pressed. Although we cannot see any gain to the plaintiff, yet injury or loss to the defendant is stated specifically, and the breach of a contract producing this is consideration enough to support or sustain the defence. See the cases above. The Act first cited as to the affidavit of defence and its nature and character, was not intended to narrow the grounds of defence in that court. Whatever by authority or on principle was a defence in any court is a defence in that court.

Judgment reversed, and a *venire de novo* awarded.

Nixon *against* M'Callmont.

A judgment for \$91,500 was amicably revived with an agreement annexed that it was "revived for the sum of \$9240, the whole amount for which the same was given having been fully paid and satisfied, except the debt due to the Bank of North America, of which the principal is \$4620." *Held*, it was revived as security for the debt due the bank, and that debt was the principal of \$4620 and interest due on it at the time of the agreement.

Such agreement is collateral to the judgment and is to be construed as if distinct and separate from it, and parol evidence is admissible to explain its meaning but not to contradict it.

ERROR to the District Court for the city and county of *Philadelphia*.

This was a *scire facias* brought by Henry Nixon, who survived John C. Stocker, against George M'Callmont. The plaintiff gave in evidence a warrant of attorney from M'Callmont, dated 12th March 1832, reciting a bond of the same date from the latter to Nixon & Stocker in the sum of \$91,500, conditioned for the payment of \$45,750 on demand, with interest, on which judgment was entered up on the same day. Also the following declaration of trust executed by Nixon & Stocker the same day, and recorded 9th May 1832:

"Whereas George M'Callmont hath this day executed to us his bond, with warrant to confess judgment, conditioning for the payment of \$45,750 on demand, with interest from the date: Now, therefore, we hereby agree and bind ourselves and each of our heirs, executors and administrators, to the said George, his executors, administrators or assigns, to appropriate and apply the money arising from the said bond, as the same may be from time to time received.

First, To the payment of all debts owing by said George, not exceeding \$50 each; of which written notice shall be given to us or either of us, on or before the 1st day of April next.

Second, If any surplus should remain, then to the payment of all notes issued, lent or endorsed for the use and accommodation of the said George M'Callmont, by the following persons, or for which they or either of them are or may be liable. That is to say,

By Henry Nixon, ...	\$28,160
By John C. Stocker, ...	7,300
By John Hemphill, ...	1,650
By Philip A. Ricard, ...	4,600
And to the payment of debts due from said George to John M'Callmont, for the wages of him and his wife, amounting, to	2,816

The second class amounting, in all, to\$44,526

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And if the money which may be received by us under said bond shall not be sufficient to pay the whole of the debts of the second class, then to distribute and pay the same from time to time, pro rata, on account thereof. And if any surplus should remain, then to pay over the same to the said George, his executors, administrators or assigns: Provided," &c. (proviso as to the responsibility of the parties). "And provided further, that nothing herein contained shall be construed to prevent any proceedings on the said bond, before said note may become payable for the whole amount thereof; it being understood and agreed, at the execution of said bond, that the same may be proceeded upon at our discretion, either for the security of the debts before-mentioned, or for the timely provision of funds for the payment of said debts and notes, or otherwise, as to us should seem requisite, notwithstanding said notes should not be payable according to their tenor."

On the 28th June 1837 the following amicable agreement, signed by M'Callmont and Nixon, was filed:

"Henry Nixon, who survived J. C. Stocker, vs. George M'Callmont. Dt. Ct. *Scire facias* to revive judgment. D. S. B. March 12, 1832. For \$91,500.

It is hereby agreed that the above judgment shall be, and the same is hereby revived for the sum of \$9240, the whole amount for which the same was given having been fully paid and satisfied, except the debt due to the Bank of North America, of which the principal is \$4620."

The plaintiffs then offered proof of the amount of interest due to them on their debt at the time of the entry of this last judgment, (28th June 1837). This evidence was objected to by the defendant; and on an intimation from the court that under the pleadings it could not be received in that stage of the cause, was withdrawn for the time.

The defendant then gave in evidence the following receipts endorsed on the agreement for judgment and signed by Nixon:

"Received of George M'Callmont \$2620 on account of the debt due as above, November 20, 1838, leaving \$2000 yet due."

"Received June 25, 1839, of George M'Callmont \$1000 on account of the within bond, leaving a balance due of \$1000."

The plaintiffs then, for the purpose of showing the amount of interest due by the defendant at the time of the confession of the judgment of 1837, after reading a notice to the defendant to produce an account dated April 26, 1837 and transmitted to the defendant by the cashier of the Bank of North America, called the cashier to prove he had sent the account to the defendant, a copy of which was produced, and that the defendant had acknowledged the receipt of it. This evidence was objected to by the defendant and overruled by the court, who sealed an exception.

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This account was headed, "Statement of interest on George M'Callmont's notes endorsed by Henry Nixon." It charged the interest and gave credit for the various dividends received, and closed with a balance due of \$4620 with interest from the 9th August 1836 (when the last dividend was received) to the 26th April 1837.

The plaintiffs further offered the following letter from M'Callmont to Nixon, dated June 22, 1837: "Dear Sir,—It is my wish to have the bond cancelled which I gave to you and J. C. Stocker in 1832, as trustees, and to give you one for the balance due on the principal, viz. \$4620, with stay of execution for six months. In relation to the interest due, I will give you the notes of G. M'Callmont & Co., payable at such periods as we may agree upon—say six, nine and twelve months." This evidence was objected to by the defendant and rejected by the court, and an exception sealed.

The plaintiffs further offered in evidence an account dated 19th February 1840, sent to the defendant by the cashier of the Bank of North America, and produced by the defendant on notice. This account was headed, "George M'Callmont & Henry Nixon, Dr to the Bank of North America for the following notes drawn by George M'Callmont and endorsed by Henry Nixon (and interest thereon)." It commenced in 1832 and ended 31st January 1840, and stated the interest due and dividends received, and closed with a balance of \$4101.48 interest and \$1000 principal; total \$5101.48. The defendant objected to this account, but the court overruled the objection and allowed it to be read to the jury, instructing them at the same time that no part of the account referring to matters antecedent to the entry of the agreement to revive the original judgment on the 28th June 1837, was to be taken or considered by them as in any way whatever affecting such agreement, or the amount of the judgment of revival, or as a guide to them in assessing or ascertaining the sum for which they were to give a verdict in the present case; but that the same was to be understood to be wholly and entirely inoperative. The effect of the entries referring to matters subsequent to the 28th June 1837, was, however, a proper subject for their consideration. The plaintiffs excepted to this instruction.

The plaintiffs then offered in evidence the notes of the defendant, endorsed by Nixon and referred to in the declaration of trust as intended to be secured by the original judgment, but they were severally objected to by the defendant and rejected by the court, who sealed an exception.

The Judge charged the jury as follows:

The judgment is conclusive evidence of the amount which it was taken to secure. If the plaintiff had antecedent rights, which might have been included in the judgment but were not, we cannot notice them in this action. The utmost, then, which the plaintiff could have demanded, if we suppose nothing had been

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paid, would have been \$4620, with interest at six per cent. from the time the judgment was confessed to this time; but whatever the defendant has paid upon the judgment since it was given, should be allowed him. The defendant claims to be allowed two sums, viz. \$2620, paid on the 20th November 1838—a receipt has been read, showing this payment, concluding with the words, “leaving \$2000 yet due;” the other sum is \$1000, paid on the 25th January 1839—a receipt has been given in evidence, showing the payment of this sum, concluding with the statement “leaving a balance due of \$1000.” You will therefore proceed upon these principles. Compute the interest upon the debt mentioned in the judgment, till the time of the first payment, and then deduct from the debt and interest so computed, the first payment of \$2620; then compute the interest upon the balance up to the time of the second payment of \$1000, and then deduct that; and then proceed to compute the interest upon the balance until the present time.

But an account has been given in evidence, showing, it is said, a balance of \$5101.48 due on the 19th February 1840. This account includes matters which transpired between the parties before the date of the judgment in question, as well as two payments since. This paper cannot have the effect of enlarging the judgment. The utmost that the plaintiff can receive under this judgment, is the sum which it was confessed to secure, with lawful interest. If there is any hardship in this rule, we cannot help it. The legal effect of a judgment of a court of record is as well defined as anything else. If the plaintiff was entitled to a sum for interest at the time of the confession of the judgment, which was not included in it, the plaintiff cannot recover it in this action, however just his claim for it may be. The plaintiff cannot get more out of the judgment than is in it. I did not feel at liberty, however, to reject this account when offered in evidence. Had the receipts for the \$2620 and the \$1000 been so expressed as not to appropriate those sums to the judgment, the account might have been very important evidence upon the question of appropriation. But the receipts appropriate the payments expressly; the first receipt is said to be “on account of the debt due as above,” and that receipt is written at the foot of the agreement to confess the judgment. The other receipt purports to be “on account of the within bond,” but within is the agreement to confess the judgment. It is not, properly speaking, a bond, but the same, you perceive.

It is contended by the defendant that the utmost which can be recovered is \$1000, with interest from the 25th January 1839. The argument is founded on an expression in the receipt of that date, that only \$1000 was due. An expression of this kind in a receipt is not absolutely conclusive. The right of the plaintiff was to have interest from the date of the judgment, and the defend-

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ant is bound to show either that the interest is paid, or some agreement between the parties that it should not be demanded. The defendant relies on the expression in the receipt before referred to, in which the balance is stated, and also upon the account which was given in evidence by the plaintiff dated 19th February 1840. But the part of the account relied on refers, as I have said, to matters which transpired before the judgment, and should not be allowed to vary the rights of the parties under it. As to the expression in the receipt touching the amount due, it does not appear to me to be anything more than such a general statement as would be made when a receipt is given without a calculation of interest. But this is a question for you to consider.

The jury retired, and after some time returned into court and requested the Judge to explain that part of his charge which related to interest since the revival of the judgment in 1837.

The Judge further instructed them:

1. That they had no right to take the sum of \$9240 as the amount due in 1837 and so settled by the parties; but that they must take the sum of \$4620 as the agreed and settled debt then existing, and charge interest on that sum only, unless they could find in the papers in evidence something to induce them to believe that the parties had made a contract to charge no interest.

2. That they were not authorized by any evidence in the cause to go behind the judgment of June 1837 and charge the defendant with interest then due; and that they had no right to take the account of February 19, 1840 as evidence of anything prior to June 28, 1837; and could not infer any agreement or consent on the part of the defendant to allow interest, except on the sum of \$4620 from the 28th of June 1840.

The plaintiffs excepted to the charge and assigned errors in the bills of exception and charge of the court.

Williams, for the plaintiff in error.

Markland (with whom was *Meredith*), contra.

The opinion of the Court was delivered by

ROGERS, J.—The fundamental error, which lies at the root of the case, arises from the opinion of the learned Judge, that the judgment of revival of the 28th June 1837 was for the precise sum of \$4620, and consequently drawing the necessary conclusion from these premises that nothing could be given in evidence anterior to that time to vary the amount. We, however, conceive it to be a judgment for the sum of \$9240 given for a special purpose, viz. as a collateral security for a debt due the Bank of North America, for which the plaintiff had become bound as an endorser for the defendant. The principal of the debt, as appears by the agreement filed of record, was \$4620; but from this it does not follow

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that that sum was the amount of the debt. Indeed the very reverse would seem to be its most natural interpretation. "It is hereby agreed that the above judgment shall be and the same is hereby revived for the sum of \$9240, the whole amount for which the same was given having been fully paid and satisfied, *except the debt due to the Bank of North America, of which the principal is \$4620.*" It is given to secure the *debt due the bank*; and what is the debt but the principal and interest? The principal of the debt is one thing, the interest is another; the aggregate amount of both constitutes the debt due. The word "principal" is a designation or description of the debt intended to be secured by the judgment. Suppose the parties had used this language; "except a note or bond due the Bank of North America, of which the principal is \$4620;" would it be seriously contended that the word "principal" was anything more than the description of the note or bond, and would it be insisted that the plaintiff would be entitled to a security for that amount only, although at the time of the agreement several years' interest was due and unpaid? This, I think, would hardly be alleged, and yet the debt due the bank here arose from notes on which M'Callmont was the drawer and the plaintiff the endorser. It strikes me, therefore, with irresistible force, that all that was intended was merely to ascertain the amount of the principal of the debt, leaving the interest and the principle of the calculation to be afterwards adjusted by the parties, by the court or a jury. It must be observed that the agreement, although filed of record, is collateral to the judgment, and does not form part of it. It must receive the same construction as if entirely distinct and separate from the judgment. And this view of the case is put beyond all doubt by the evidence which the court thought proper to reject. That it was understood that the defendant was to pay the interest as well as the principal, appears from his letter of the 22d June 1837. It is difficult to believe that Mr Nixon agreed to terms less favourable to himself than were offered by the defendant six days before the confession of the judgment. It may be remarked, that the defendant knew the claim of the bank to debt and interest, the latter calculated in a manner most favourable to himself. To give this agreement any other construction would do great injustice to the plaintiff. He is liable to the bank for the whole debt and interest, whereas, according to the opinion of the learned Judge, he can recover from the principal debtor only the debt without interest. In other words, the principal debtor is liable for less by the whole amount of the interest than his endorser. It requires something more unequivocal than the language used in this agreement to induce me to believe that the parties intended to produce any such result. From this opinion it follows that the court was wrong in excluding the testimony. True, you cannot add to, diminish, vary or contradict a written

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agreement, but there is nothing to prevent the parties from explaining it. The evidence offered was in explanation, in conservance and support of the agreement, and not in contradiction to it, and for this reason we think it was clearly admissible.

Judgment reversed, and a *venire de novo* awarded.

Bond against Aitkin.

A partner may bind his copartner by a contract under seal in the name and for the use of the firm in the course of its business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol.

The bond of one partner taken at the time money is loaned to the firm, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security.

ERROR to the Common Pleas of *Delaware* county.

This was an action of debt brought by Charles Bond against John Aitkin and James Aitkin, trading under the firm of John and James Aitkin, on the following note:

Six months after date we promise to pay to Charles Bond or order four hundred dollars, with five per cent. interest, without defalcation, for value received. Witness our hands and seals, this 1st day of October 1836.

JNO. & JAS. AITKIN. [L. s.]

The plaintiffs declared in one count against the defendants as partners in a sealed instrument alleged to have been executed by them, and in another against them as partners for money lent. James Aitkin pleaded payment with leave, &c. and *non est factum* to the first count. Judgment by default was entered against John.

The plaintiff called a witness, who testified that he called on James Aitkin, and presented to him the note in suit for payment. Witness asked him if he had signed it. He replied that he had not, that John had signed it; that he did not know it at the time, but if he had, he would have been perfectly satisfied; the money was got for the firm and went into the firm. Witness then asked him for his individual note, which he refused, saying he preferred it should be sued out as a partnership claim, that the neighbours might know it was not his fault. He said he could not pay the amount of the note at that time, but if he could make collections, it should be paid by the 1st October: he had left his brother to settle the books and thought he had paid it. Witness told him he thought he would have to pay the note, when he replied he thought

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the note as good as if he gave his individual note. He admitted that he and John had been partners.

Another witness proved that the body of the note and signature were in the handwriting of John Aitkin. That the defendants were in partnership for several years, John being the active partner. The partnership was dissolved about the year 1839. On the dissolution the property remained with John, who was to pay the debts of the firm.

BELL (President) charged the jury as follows:

The plaintiff declares in two counts, one on a bill single alleged to be executed by John and James Aitkin, dated October 1st 1836, to secure the payment of \$400. To this the defendant James Aitkin pleads *non est factum*; and this plea raises the question whether the obligation is in truth the deed of John and James, as the plaintiff argues. It appears the bill obligatory was signed by John alone, and although he used the name of his partner as one of a firm, it is not binding on James; for, generally speaking, one partner cannot bind another by specialty or instrument under seal, sealed instruments not being such as are used in transacting partnership affairs. The plaintiff cannot, therefore, recover on his first count, for he has failed to prove the bill single declared on is the deed of the defendants.

But the plaintiff, in a second count, declares against John and James Aitkin, as partners, for money loaned to them. On the evidence, the jury can entertain little or no doubt that the money sought to be recovered was borrowed from the plaintiff on the partnership account and applied to partnership purposes, and so became the joint debt of both the partners, though actually borrowed but by one of them. *Primâ facie*, therefore, both would be liable in this action. But in answer to this statement of the plaintiff's claim, the defendants set up the bill single given in evidence by the plaintiff under his first count, as a bar to his recovery on the second. This bill single must be taken as executed by John Aitkin alone; for though signed in the name of the firm, it is good against him, and him alone. But it is the undoubted rule in Pennsylvania, that if the creditor of a firm accept the obligation of one of the partners for the firm debt, the original claim is merged and extinguished in the new security, and the creditor cannot afterwards have recourse to the first liability, as is attempted here.

But it is shown that James Aitkin promised to pay this debt subsequently to the execution of the bill single, and if this were an action against him alone, I incline to the opinion that the plaintiff might recover on this promise, as based on a subsequent consideration. But this is an action against two, John and James; and before the plaintiff can recover, he must show a joint liability on the part of the defendants to answer. In this he has failed. I am, therefore, of opinion the plaintiff is not entitled to recover in this action, and your verdict ought to be for the defendants.

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The plaintiff excepted to the charge, and assigned the following errors:

1. The court erred in charging that the bill single executed by John Aitkin was an extinguishment of the joint debt of both defendants.

2. In charging that the plaintiff could not recover upon the second count of the declaration.

3. In charging that the plaintiff could not recover upon James Aitkin's promise to pay.

4. In charging that there was no joint liability.

5. In charging that the bill single was void as to James Aitkin.

Edwards and B. Tilghman, for plaintiff in error. A partner may be bound by a deed executed on behalf of the firm by his copartner, provided there be either a previous authority or a subsequent adoption of the act. 3 *Kent* 47; *Cady v. Shepherd*, (11 *Pick.* 405); *Taylor v. Coryell*, (12 *Serg. & Rawle* 249); *Darst v. Roth*, (4 *Wash. C. C.* 471); *Story on Part.* 180; and such previous authority or subsequent ratification need not be under seal, nor in writing, nor specially communicated for the specific purpose; but may be inferred from the partnership, and from the subsequent conduct of the copartner implying an assent to the act. *Gram v. Seton*, (1 *Hall* 262).

But the note is not a bar to the plaintiff's recovery on the count for money lent. 4 *B. & C.* 968; 1 *Saund. Pl.* 403; *Emly v. Lye*, (15 *East* 6). The separate note of one partner is not an extinguishment or satisfaction of their joint debt, unless there was a special agreement to that effect, or such was the intention of the parties; and this is a question for the jury. *Estate of Davis & Desauque*, (5 *Whart.* 538); *Sheehy v. Mandeville*, (6 *Cranch* 264); *Mason v. Wickersham*, (4 *Watts & Serg.* 100); *Bedford v. Deakin*, (2 *B. & Ald.* 210). They also referred to *Day v. Leal*, (14 *Johns.* 404); *Wallace v. Fairman*, (4 *Watts* 379); *Weakly v. Bell*, (9 *Watts* 280); *Jones v. Johnson*, (3 *Watts & Serg.* 279).

Lewis, contra. An instrument under seal executed by one partner in the name of the firm, will not bind his copartner, unless there be an express authority by deed, or he be present and assent to the sealing and delivery by the other as the act of the firm. *Harrison v. Jackson*, (7 *T. R.* 207); *Hart v. Withers*, (1 *P. R.* 285); *Overton v. Tozer*, (7 *Watts* 331); *Gerard v. Basse*, (1 *Dall.* 119); *Cash v. Tozer*, (1 *Watts & Serg.* 519); *Bitzer v. Shunk*, (1 *Watts & Serg.* 341); *U. States v. Astley*, (3 *Wash. C. C.* 508); and no subsequent acknowledgment or declaration after the dissolution of the partnership will make it the act of the firm. *Searight v. Craighead*, (1 *P. R.* 135); *Deckert v. Filbert*, (3 *Watts & Serg.* 454.)

The opinion of the Court was delivered by

SERGEANT, J.—The question arising in this case has undergone

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a thorough discussion in the two late cases of *Gram v. Seton*, (1 Hall 262), and *Cady v. Shepherd*, (11 Pick. 400), where all the authorities are examined, and the principle is settled that a partner may bind his copartner by a contract under seal, in the name and for the use of the firm, in the course of the partnership business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. And we are satisfied that the rule is founded on principles of justice and policy, and supported by the general tenor of the adjudged cases in this country and in England. The only question in the present case is, whether there is any evidence to go to the jury to show that James Aitkin assented to the giving of the sealed bill in the name of the firm, before or at the time of its execution, or afterwards ratified it; and we think there is. The admissions made by him in the conversation with Carter, if believed, in connection with the fact that the money was got for the firm and went to its use, are evidence to go to the jury. He said that though he did not know of it at the time it was given, yet, if he had, he would have been perfectly satisfied; if he could make collections, he would pay it in October. He repeatedly desired it should be sued as a partnership claim, and declared the note was as good as if he gave his individual note. This and the whole tenor of the conversation tend strongly to the inference that he had authorized the giving of it; and we think the evidence ought to have been left to the jury to say whether such authority was given, or whether the defendant subsequently ratified the instrument.

On the additional count, we think the plaintiff has not shown a right to recover. Where the bond of one of the partners is taken for an antecedent partnership debt, it may be considered either as payment and extinguishment of such debt, or only a collateral security, according to the nature of the transaction and the circumstances attending it. *Wallace v. Fairman*, (4 Watts 378). But where there is no antecedent debt, but the bond of one partner is taken at the time money is loaned to the partnership, and as the consideration for loaning the money, it can hardly be treated as a collateral security. It must be considered as all one transaction, and the bond as the only security contemplated; unless, perhaps, there were strong and positive evidence to show an express agreement to the contrary by all parties. If so, then in this case the bond was the only debt; the plaintiff, if he recovered at all, must recover on it, and not on the money counts. And as there was no implied contract by both, so the express promise proved was only by one; and, therefore, we are of opinion the charge of the court below was correct, that the plaintiff could not recover on the additional count.

Judgment reversed, and a *venire de novo* awarded.

Woodman *against* Good.

A testator's declarations of intention in his lifetime as to the relative powers of those beneficially entitled under a trust created by his will, are inadmissible in an action for waste by the trustee against the equitable tenant for life.

An equitable tenant for life is liable to an action of waste at the suit of the trustee-in-fee of the legal estate.

In such suit, the plaintiff need not name himself trustee.

ERROR to the Common Pleas of *Bucks* county.

This was an action on the case for waste brought by John Good Jr, against Henry Woodman and Mary his wife, late Mary Smith. The declaration set forth that Henry Woodman and Mary his wife on, &c. was and still are seised and held and enjoyed divers, &c. acres of land, with the appurtenances, situate, &c. in their demesne as of freehold in right of the said Mary, the remainder thereof after the death of the said Mary, during all the time aforesaid belonging to the said John Good Jr. Nevertheless the defendants, &c. 50 white-oak trees, &c. on the lands and premises aforesaid, then and there standing, &c. did waste, cut down, destroy, take and carry away, to the damage of the plaintiff, &c. The narr. also contained a common count for trover and conversion.

The amended declaration complained that whereas Benjamin Smith by his last will devised *inter alia* as follows, &c. and whereas Woodman and wife, &c. were and still are seised and held and enjoyed the aforesaid lands, &c. in her demesne as of freehold, and the said Henry in right of the said Mary, the remainder thereof after the death of the said Mary during all the time aforesaid belonging to the said J. Good, Jun. in trust as aforesaid. Nevertheless, &c.

The plaintiff read the following clause in the will of B. Smith: "I give and devise to John Good, Jun. and to his heirs and assigns for ever, all that mansion and part of my plantation whereon I now reside: In trust nevertheless to and for the following uses, intents and purposes, and for no other uses, intents or purposes whatsoever, that is to say: In trust that my said daughter Mary, the wife of Henry Woodman, shall receive, have and hold, to and for her sole and separate use and benefit, the possession and all the rents, issues and profits of the said lands and premises with the appurtenances during all the term of her natural life, free from the control, debts or engagements of her present or any future husband, and from and immediately after the decease of my said daughter Mary, then upon trust, that he shall assign, transfer, set over and surrender the real estate aforesaid to the children of my

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said daughter Mary share and share alike in fee, subject nevertheless to the privileges of my said wife and the payment of the annuities aforesaid to and for her use, and to the payment of my funeral expenses."

The plaintiff proved by witnesses that Woodman and wife had been in possession of the tract in question since the death of Smith in 1841. Woodman managed and farmed or let the whole tract, consisting of about 120 acres, of which about 30 were wood-land. In March 1841, Woodman advertised a public sale of about 6 acres of the standing timber, and sold 19 or 20 quarter-acre lots to different purchasers, from which the timber was cut and removed during the spring and summer. The sale amounted to \$130. The timber was white-oak, black-oak, hickory, &c., improving timber and suitable for posts and rails. He declared his object in selling was that he might purchase property elsewhere. The timber on the farm before the sale was not more than sufficient, though there was a larger proportion of it than on many farms in the neighbourhood. Wood-land was more valuable than cleared land in that part of the country. The cutting of the timber was an injury to the children, and diminished the value of the property by the value of the timber, say from \$20 to \$25 per acre. It was also proved Mrs. Woodman had six children.

The defendants then offered to prove by a witness that Smith, shortly before his death, directed Woodman to clear the timber from off the land on which the timber was cut. The court rejected this offer on the ground that conversations between the witness and the testator could not change the nature of the grant; and sealed an exception.

The defendants further offered to prove that after the date of the will, the testator gave directions to Woodman to clear the wood off this five acres of land. The court rejected this evidence, and the defendants excepted.

They then offered to prove that the testator, before and after the date of the will, directed Woodman to clear the wood off the five acres now in dispute; that he directed individuals who came to him, to buy wood from this lot; that he gave as a reason for wishing it cleared, that it was not improving, that he had more wood than was necessary for the use of the farm, and that the lot was in an exposed situation. This testimony was also rejected, and a bill sealed.

The defendants' witnesses testified that the timber on the tract in question was poor timber, not fit for posts and rails, and the land was constantly getting poorer by the leaves being blown off. That the cutting of the timber was an advantage to the lot, which, in a few years, if well tilled, would become more valuable as arable than as wood-land. The farm still contained more woodland than generally neighbouring farms of the same size. It was important to clear the land and sell the timber, to educate the children. It

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would have been to the advantage of an owner to cut and sell the timber and raise grain, though the land would sell for less without the timber than with it.

The court charged the jury as follows :

This is an action on the case for waste, a suit not often in use in Pennsylvania. There are, no doubt, many cases of wrong in which it is a proper remedy. Waste is a destruction or spoil in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail. It is a well-settled principle, that whatever is a lasting damage to the freehold or inheritance, is waste. To convert wood, meadow or pastures into wood-land, or to turn arable or wood-land into meadow or pasture, may be waste, where it is an injury to those who have the remainder-in-fee. We take it that the tenant for life in Pennsylvania may clear land, when a sufficient quantity of timber-land is left for the use of the place, having regard to the relative proportion of cleared land ; and we adopt the rule of sound sense which pervades our books, that the governing inquiry for the jury is, was the act complained of an actual injury to the inheritance ? A devise to A. for life of a tract of wood-land, remainder to the children of A. in fee ; the law was so held that if A. could not clear a considerable portion of the land, the devise would be an injury instead of a benefit, and might be a loss to those in remainder. You may at this day, in some part of the State, purchase a good tract of unseated land for \$2 per acre. Every acre of that land, to clear and fence, will cost from \$8 to \$12. When one-half is cleared, and cheap buildings are erected, it will be worth \$20 an acre. But it is not so in Bucks county. Here it is proved and admitted wood-land is more valuable than any other land. The timber sells from \$40 to \$50 an acre, according to its quality, and the purchaser removes it. In the West you have to pay more than the land costs to remove the timber. We say, then, the true inquiry in each case is, is the act complained of an actual injury to the inheritance ? If it is so found, then the proper plaintiff is entitled to damages.

The defendants ask us to instruct you—

1. That this suit cannot be sustained, because it has been brought personally, and not in the character of trustee.

6. That the trust committed to J. Good by the will of B. Smith is merely a naked trust, and does not authorize him to preserve the inheritance from waste.

On these points the court refuse to instruct you as desired. To bring before the jury the inquiry whether waste and injury to the inheritance has been committed, we instruct you, if you find a material and actual injury has been done to the children of Mary Woodman, to their inheritance, this action can be maintained.

2. That the declaration alleges that Henry Woodman and Mary his wife, defendants in this case, are seised of freehold of the pro-

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perty in dispute; whereas the said Henry has no interest in the property.

3. That the declaration alleges the plaintiff is seised in fee in his own right, and not as trustee; whereas it ought to be alleged that he was seised in fee simple as trustee.

Objection was made to the declaration early in this cause, and the court then said they would give the plaintiff leave to amend it in accordance with his title as trustee. We treat the case as if all proper and necessary amendments were made in the declaration.

4. That unless the wood has been cut in such manner as to materially injure the inheritance, it is not waste.

5. To what extent wood or timber may be cut down without waste, is a question of fact for the jury.

The court accede to these propositions.

You have heard the evidence as to the quantity of wood on this tract. Does it not show the plantation contains from 112 to 120 acres? After these 5 acres are cut, there are still not less than 24 to 25 acres of better wood-land left, besides the Indian field, on which some timber is growing. Now although timber-land is more valuable in Bucks county than arable land, still, I think, in a case like the present, and so instruct you, that if you find there was more than a necessary quantity of wood-land in this tract, although the wood-land was more valuable than the arable land, the tenant for life would have a right to clear for the purpose of raising bread and supporting the family. Suppose the whole tract was wood-land, devised, as in this case, to a daughter with a family of children, to her for life and the children in fee, she could not support herself and children on the timber if she preserved it. She and her children must have bread. The children must have clothing and education, bread and raiment. She may clear land and cut timber for that purpose, reserving a proper proportion of timber for the farm. We thus reduce this case to an inquiry, was a proper proportion of timber left for the use of the plantation? Was the destruction of the timber on the 5 acres, under all the evidence, an injury to those in remainder? If you so find, then the plaintiff will be entitled to your verdict. But if you find such quantity is left for the use of the place as is a just proportion to the whole tract; if the cutting of the timber was essential to the enjoyment of the plantation, the life estate, and no material injury was done to those in remainder, then your verdict should be for the defendants.

The defendants excepted to the charge. A verdict was rendered for the plaintiffs.

Errors assigned:

1. The court erred in rejecting the testimony embraced in the bills of exception.

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2. In their answers to the 1st and 6th, and also to the 2d and 3d points of the defendants.

Roberts, for the plaintiffs in error.

The testimony offered was not to change the devise but to show that waste had not been committed, because the testator, after the execution of the will, directed the wood in question to be cut. This was a fact collateral to the will, and parol evidence was therefore admissible. Declarations made in relation to land by persons whilst owners of it, are admissible. 2 *Stark. Ev.* 570; *Strickler v. Todd*, (10 *Serg. & Rawle* 73).

The trustee cannot sue for waste. He has the legal estate only during the life of the *cestui que trust*, at best, and not even then, for he is only trustee for a particular purpose, to preserve the wife's separate estate and prevent the husband's creditors from coming upon it; and after the wife's death, the remainder is instantly executed in the children. *Lew. Trusts* 234, 237; *Fletcher Trusts* 51; *Kerlin's Lessee v. Bull*, (1 *Dall.* 177); *Kinsey v. Lardner*, (15 *Serg. & Rawle* 196).

The declaration does not mention the interest of the plaintiff and defendant correctly. The defendant had no interest in the estate; he was not seised of a freehold in right of his wife. The husband cannot be tenant by the curtesy of his wife's separate estate. *Cochran v. O'Hern*, (4 *Watts & Serg.* 95). The wife is not chargeable with waste, as she is bound to maintain the children, and there is no clause prohibiting her from committing waste.

Chapman, contra. The evidence offered conflicts with the will and tends to vest the defendant with a control over the property beyond what is given by the devise. The opinion of the testator or his design to cut the timber himself is not material in the present issue. The defendant holds in an entirely different right from that of the testator.

(He was here stopped by the court.)

PER CURIAM.—The trust in this case has been created by will; and the testator's declarations of intention in his lifetime, as to the relative powers of those beneficially entitled, were, of course, properly excluded.

A more novel question is whether an equitable tenant for life is liable to an action of waste at the suit of the trustee. In England he might be restrained by injunction, but our direct equity powers do not extend so far; yet surely an equitable tenant for life may not commit waste with impunity. And to whom is he answerable, in an action at law, but to him who has the legal title, and whose office it is to preserve the inheritance for those in remainder? It is objected that he has not named himself trustee in his declaration. But what of that? He sues as the legal owner of the land; and

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a court of law has nothing to do with equitable titles in the pleadings. He sues for the use of those in remainder; and though the trust may or may not be marked on the record, it is no part of the title. The children in remainder, whose estate has been injured, are the beneficial plaintiffs, and he will hold the money recovered for them. As to the variance in the declaration as to the alleged seisin of the husband of the equitable tenant for life, who is said to have no interest in the land, it is enough to say we are not bound to let a technicality of the sort stand in the way of an equitable action, which is the creature of necessity.

Judgment affirmed.

Utt against Long.

In an action to recover daily pay and mileage as a witness for the plaintiff in an ejectment by a lunatic in the name of his committee, against one who was alleged to have brought and carried on the ejectment, the committee is not a competent witness for the plaintiff.

In such action the executor of the lunatic is a competent witness for the plaintiff, where it appears the estate of the lunatic was sufficient to pay the costs of the ejectment.

One who merely takes an active part in carrying on a suit in the name of another, is not liable to the plaintiff's witnesses for their daily pay and mileage without an express promise to pay. But he is liable without such promise, where he projects and institutes the suit in another's name and is the active agent in having it brought.

A witness may bring suit for his daily pay, &c. against the party who subpoenaed him and who lost the cause, without having the bill of costs taxed and making demand before suit brought.

In answering a point put so as to meet the view of the party making it or so as to meet only part of the facts in evidence, it is not error but the duty of the court to frame their answer so as to be applicable to the case trying and the evidence given.

ERROR to the Common Pleas of *Northampton* county.

This suit was originally brought before a justice of the peace by Abraham Long against Elias Utt to recover \$4.03½, the amount of his daily pay and mileage as a witness for the plaintiff in an action of ejectment in which Adam Utt, a lunatic, by his committee William Hackett, was plaintiff, and Jacob Utt defendant. The justice gave judgment for Long, from which the defendant appealed.

The plaintiff, after giving in evidence the record of said ejectment, offered to prove by William Hackett that although his name was used on the docket, yet Elias Utt had the ejectment brought

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and carried it on. The defendant objected to this evidence that it was irrelevant to the issue trying, and that the plaintiff on record could not shift his own responsibility for costs and expenses on another by his own testimony. The court overruled the objection and admitted the evidence, and the defendant excepted.

Hackett then testified that he was appointed the committee of Adam Utt for the mere purpose of instituting the ejectment, and that Mr Brooke informed him the court had appointed him for that object. He never gave bond or took on himself the duties of trustee. He never attended the suit, employed counsel or subpoenaed witnesses. The only persons he knew that attended to the suit were Elias Utt and his son Adam; and he frequently saw Elias in consultation with Messrs Porter and Brooke, the plaintiff's counsel. Elias was a son of the lunatic. He (Hackett) went into Luzerne county to take a deposition in the cause, but not as committee; he was in Mr Porter's office at the time.

A witness then testified that he, Long and others came down twice to attend as witnesses in the ejectment at Easton, from which Long lived eighteen miles distant. The last time they were there two days. He thought Elias was there. Elias's son, who subpoenaed witness, was also there.

The plaintiff then called George Kleinfelter as a witness, admitting that he was the executor of the lunatic, and as such had sufficient assets in his hands to pay the costs and charges of the ejectment. The defendant objected to his competency on the ground of interest, but the court overruled the objection and admitted the witness and sealed an exception.

The plaintiff then stated what he intended to prove by the witness, as stated in his testimony immediately following, to which the defendant objected as irrelevant to the issue trying, but the court admitted the evidence and sealed an exception.

The witness then testified that Elias Utt presented him as executor with a bill of costs and counsel fees in the ejectment. He told Elias that his brother Adam had objected to paying any costs, as Elias had carried on the suit on his own account, when Elias replied that it was carried on in Hackett's name. Witness considered the estate good enough for the costs.

The defendant called his son, who testified that he paid Theophilus Hackett \$4 for Long's bill. No one directed him to pay it. The bill he paid was for the expenses of the witnesses in the ejectment. He asked Messrs Porter and Brooke to attend to the suit. His father was not down at the meeting when the witnesses were examined.

The payment of Long's bill by the last witness was then confirmed by the testimony of Theophilus Hackett.

The following were the points submitted by the defendant and the answers of the court:

1. That as Elias Utt was not a party to the suit on the record

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the fact of his taking an active part in carrying on the suit would not make him liable to the witnesses for their fees, without an express promise to pay. *Ans.* Merely taking an active part in carrying on the suit without an express promise to pay, would not make the defendant liable in this action. But if you believe that the defendant was the active agent in having the suit brought, that it was projected and instituted by him in the name of the committee, he would be liable to the witnesses who were subpoenaed and attended on the part of the plaintiff in that action for their daily pay and mileage, without an express promise to pay.

2. That an agent subpoenaing witnesses for a party is not liable from that mere fact for the cost of witnesses who attended. *Ans.* This point is correct, and we charge you that the law is as stated in it.

3. That as it is not proved that Elias Utt either subpoenaed the plaintiff or promised to pay him for his attendance, the plaintiff cannot recover against him. *Ans.* If the defendant caused the suit to be brought and was the active man in having it carried on, then he would be liable, although he neither served the subpoena on the plaintiff nor promised to pay him, if you believe he was subpoenaed and did attend as a witness on the trial.

4. That a witness cannot maintain a suit against a party for his fees without having the bill taxed and a demand made before suit brought. *Ans.* The court charge you that the law is not as stated in this point.

The defendant excepted to the charge and assigned the following errors:

1. The admission of William Hackett as a witness and the subject-matter of his testimony.

2. The admission of Kleinfelter as a witness and the subject-matter of his testimony.

3. The answer to the 1st point and in coupling that answer with a state of facts which did not appear in evidence.

4. In the answer which purports to be given to the 3d point and in not answering the matter contained therein.

5. In the answer to the 4th point.

6. The whole tenor of the charge recognising the right of the plaintiff to recover under the evidence.

Brooke, for the plaintiff in error. Hackett consented to become a party on the record and carried on the suit in his own name, by which he became personally liable for costs; *Musser v. Good*, (11 *Serg. & Rawle* 247); and his evidence went to throw this liability on the defendant. The same objection applies to Kleinfelter.

The answers to the 1st and 3d points put forth a state of facts not sustained by the evidence. It nowhere appears that the ejectment was instituted by the defendant or that he was the active agent in carrying it on. But were that so, it would not make him

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liable for costs. There was no express promise to pay here, as in *Brewer v. Hayes*, (2 *Watts* 12). The Act of 23d April 1829, (*Purd.* 53), provides only that an equitable plaintiff shall be liable for costs: but the defendant was not the equitable plaintiff. To make him so, his name must appear on the record by suggestion or otherwise.

The present action is not maintainable. The bill should have been taxed and an attachment issued. 1 *Pet. C. C.* 233; 1 *Whart. Dig.* 272, *M. S.* The party is not liable while the suit is pending, as was held in *Lyon v. M'Manus*, (4 *Binn.* 172); and here the witness's right to recover can only exist after his claim has been taxed and allowed in the usual manner.

Reeder, contra, confined to the first exception. If Hackett were bound to pay these costs, it was only as the agent of the lunatic's estate. He had no personal interest; he could gain or lose nothing by the event of the suit. The presumption would be that the suit was properly brought and for the benefit of the lunatic.

The opinion of the Court was delivered by

HUSTON, J. — The plaintiff below, who was defendant here, attempted to make out that Elias Utt had caused a suit to be brought in the name of William Hackett, in which suit there was a verdict and judgment for the defendant. Abraham Long had been under subpœna to attend and had attended as a witness for the plaintiff in that cause, and for his mileage and daily pay as such witness this suit was brought before a justice of the peace, and by appeal from his decision the case came into the Common Pleas. The plaintiff called William Hackett, who was objected to as incompetent, admitted and exception. He testified that he was appointed the committee of Adam Utt, as he understood, for the sole purpose of instituting that suit; that he never gave bond or took upon himself the duties of trustee; that he did not know that he ever agreed to accept the trust; that Mr Brooke (a lawyer now deceased) called on him and told him the appointment had been made by the court and for the object of bringing that suit; that Elias Utt was a son of the lunatic, and that he knew of no person carrying on that suit but Elias Utt and his son Adam. Being cross-examined, he said he did go to Luzerne county to take a deposition, but this was done as the student of Mr Porter and not as trustee. He ought not to have been a witness. The suit, by his own statement, was brought in his name with his knowledge and consent. He was, therefore, *primâ facie* liable for costs; and whether he could be indemnified out of the estate of the lunatic would depend on whether the suit was brought on good probable grounds and advice of counsel; but he was primarily liable, and he could not be a witness to clear himself of this liability.

By the Act of 23d April 1829, sect. 2, it is provided, that "the

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equitable plaintiff or person for whose use or benefit and at whose instance any action has been or may be prosecuted, whether named on the record or not, shall be liable to execution on judgment (for costs) against the legal plaintiff or plaintiffs: Provided, that where such equitable plaintiff or plaintiffs were not named on the record previous to judgment, his name shall be suggested on the record, supported by affidavit of his interest in the cause, before execution shall issue." And I, for one, would be willing to give this Act a liberal construction, and extend it to cases where any person had procured a suit to be instituted, and carried it on, and there was no other person from whom costs could be recovered. Independent of this Act of Assembly, the point is decided in 1 *Peters's C. C. R.* 233, and in a manuscript note in 1 *Whart. Dig.* 272.

Adam Utt, the lunatic, is dead, and his representative was called to prove that Elias Utt had presented to him a bill of costs for witnesses' and counsel fees expended in carrying on that suit: he was objected to and admitted. There was no error in this. It appeared that the estate of the lunatic was amply sufficient, and his representative was a stranger to this suit between these parties.

The court was asked to instruct the jury that as Elias Utt was not a party to the suit on the record, the fact of his taking an active part in carrying on the suit would not make him liable to the witnesses for their fees, without an express promise to pay them. To which the court said; "merely taking an active part in carrying on the suit would not make him liable without an express promise to pay. But if you believe the defendant was the active agent in having the suit brought; that it was projected and instituted by him in the name of the committee, he would be liable to the witnesses for the plaintiff for their mileage and daily pay, without an express promise to pay." It is objected that this answer goes beyond the point: but it does not go beyond the case and the facts there in evidence. In answering a point put so as to meet the view of the party making it, or so as to meet only part of the facts in evidence, it is not error, but the duty of the court to frame their answer so as to be applicable to the case trying and the evidence given. There was evidence from which the jury might have fairly found that Elias Utt, and he only, caused the suit to be brought and carried it on.

The 2d point and answer were not objected to. The 3d point and answer are the same as the 1st point and answer, in substance, and no error in the answer. The 4th point, that "a witness cannot maintain a suit against a party for his fees, without having the bill taxed and a demand made before suit brought." This the court denied. The party in making this point did not advert to the difference between a bill of costs recovered by the successful party against the losing party, which must be submitted to the prothonotary and taxed by him, and the case before the court, which was that of a witness claiming his pay from the

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party who subpoenaed him and who lost the cause. There is no taxation of such a bill. The witness may demand it every term, nay, every day. I would advise that this case be settled without more contest; the costs of every day at court are more than the sum demanded; but it must be reversed on the 1st bill of exceptions.

Judgment reversed, and a *venire de novo* awarded.

Thomas *against* Shoemaker.*

An action was commenced by summons on Saturday the 1st day of January 1842, against the drawer of a promissory note dated 30th December 1840 and payable twelve months after date. *Held*, that the action was prematurely brought, the last day of grace (which was Sunday) not having fully expired before the writ issued; and that an offer in the court below to confess judgment to the plaintiff, upon terms not accepted, did not cure the error.

A month, in bills of exchange, notes and other mercantile contracts means in all cases a calendar and not a lunar month.

The parties to bills of exchange or promissory notes, entitled to claim the days of grace, have title to them as matter of right.

An action for money had and received will lie to recover back the excess of interest taken from one to whom an usurious loan has been made; and, in Pennsylvania, the defendant who is sued as the drawer of a promissory note, made by him to the order of the plaintiff, may, under the "Act for Defalcation," defalc an excess of interest taken from him by the plaintiff upon other and prior loans of money.

ERROR to the District Court for the city and county of *Philadelphia*.

Shoemaker & Ogden commenced an action against Moses Thomas by summons issued on Saturday the 1st day of January 1842, returnable on the first Monday of January 1842. The plaintiffs filed a copy of the note on which the suit was brought, in the following words:

Philadelphia, 30th December 1840.

\$184.72. Twelve months after date I promise to pay to the order of Shoemaker & Ogden, without defalcation, one hundred and eighty-four dollars and seventy-two cents, value received.

M. THOMAS.

The defendant filed the following affidavit of defence:

"Moses Thomas, the above-named defendant, being duly sworn, says, that he has a defence against part of the plaintiffs' claim in

* The reporters are indebted to E. D. INGRAHAM, Esq. for the report of this case.

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the above action, which defence is as follows, to wit, that on the 28th day of March 1839, the said plaintiffs loaned to this deponent the sum of \$500 for two months, for the use of which sum during the said two months they charged this deponent as interest the sum of \$13.35, when the legal interest therefor was \$5.35, the said plaintiffs retaining also the said amount for interest out of the price loaned, whereby the said interest was paid in advance; and on the 7th June 1839 the said plaintiffs loaned to deponent the sum of \$350 for sixty days, taking for the use of said last-mentioned sum during the said sixty days the sum of \$8.75, the legal interest being \$3.50; the said plaintiffs also retaining the said sum of \$8.75 for interest out of the said last-mentioned sum loaned, whereby the same was paid in advance. Deponent claims the right to defalk the said excess of interest above the amount of legal interest, now amounting, with legal interest thereon from the times when received, to \$15.46, from the demand of the plaintiffs in this case, and is willing that judgment should be entered for the sum really due therein, to wit, \$169.86."

The court rendered judgment for want of a sufficient affidavit of defence.

Errors assigned:

1. That the action in the court below was prematurely brought, the plaintiff in error being entitled to the whole day on which said action was brought to pay the note.
2. That the court below (supposing the action not to have been prematurely brought) gave judgment for the plaintiff when there was a sufficient affidavit of defence filed in the cause.

Ingraham, for the plaintiff in error.

It has long been settled that the days of grace are matter of right, and a party to a bill or note entitled to them cannot be sued before the last of them has expired. If it were otherwise, no reason would exist why the action might not be as well commenced on the morning of the first day of grace as on the afternoon of the last. The days of grace have always been allowed in Pennsylvania. *Bank of N. America v. Pettit*, (4 Dall. 127); *Fisher v. Evans*, (5 Binn. 541). That the last day of grace was Sunday certainly did not alter the law and accelerate the time of payment; it would seem to be a reason for an additional day. *Sims v. Hampton*, (1 Serg. & Rawle 411), and the cases there cited. Now it is well settled, that you cannot make a demand on the maker of a promissory note so as to render the endorser liable, *before* the last day of grace; *Jackson v. Newton*, (8 Watts 401); and it has been expressly decided that you cannot sue the maker of it *on* the last day of grace; *Osborn v. Moncure*, (3 Wend. 170), an authority directly in point. It has also been decided in the court to whose decision this writ of error is taken, that under the same facts as this record presents, you cannot sue an endorser. *Bevan v. El-*

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dridge, (2 Miles 353). It will, no doubt, be insisted that this error ought to have been brought to the notice of the court below, and that it was waived by the ground taken in the affidavit of defence; but the answer to that is, that the offer was refused, which, if accepted, might have operated as a release of errors, and that such an error as this, on the face of the record, is ground for reversal here, as it would have been for a nonsuit at the trial, supposing the defendant did not interpose a plea that the suit was prematurely brought. 1 *Chitt. Pl.* 453, 8th *Am. edit.*

Upon the 2d point he insisted that ever since *Lowry v. Bourdieu*, (*Doug.* 471), it had been settled that in an action for money had and received, the debtor might recover from the creditor all beyond legal interest. 2 *Starkie on Ev.* 92; *Williams v. Hedley*, (8 *East* 378). The same principle is to be found in the Pennsylvania cases, where it has been held that a creditor may, where more than legal interest is included in a note or other security, recover the amount really due, but not the usurious interest. *Wycoff v. Longhead*, (2 *Dall.* 92); *Turner v. Calvert*, (12 *Serg. & Rawle* 46). In England this might be pleaded as a set-off; 2 *Term Rep.* 42; and under our Defalcation Act, which extends the remedy so as to give the defendant the benefit of any "receipt, account or bargain" between himself and the plaintiff, these various sums, though received in other transactions, formed an item of credit to which the defendant was entitled.

Hopper, for the defendants in error. It is too late after judgment in a proceeding in the court below, which is equivalent to a trial, verdict and judgment, to set up the first error assigned. It amounts, in effect, to a waiver of it, as it was not brought to the notice of the court which rendered this judgment. It is an error which the defendant could have released, and which he, in effect, did release, by his omitting to state it in his affidavit of defence. A plaintiff in error is confined to the objections taken at the trial, and cannot afterwards trip up his antagonist on points suggested after the removal of the record to this court. *Kensington v. Inglis*, (8 *East* 280); *Rowe v. Power*, (2 *New Rep.* 36); *Baring v. Shippen*, (2 *Binn.* 168). Supposing it not to be waived, however, the action was well brought. It is well known to be the practice of the banks in this city, acquiesced in by all the mercantile and trading community, that notes are payable on Saturday in cases where the last day of grace falls on Sunday, as was the case of this note. Payment may be demanded, therefore, lawfully on Saturday in such cases, and if payment may be demanded, suit may be brought to enforce it. The very point was decided in *Shed v. Brett*, (1 *Pick.* 401), in which the action was brought against the makers of a promissory note on the last day of grace, after demand and refusal to pay, and it was held by the Supreme Judicial Court of Massachusetts, a highly commercial State, to be well brought.

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In regard to the 2d error, it is only necessary to say, that this is the first time this defence has been set up in this way; and it is not the same question as that raised in the cases of *Wycoff v. Longhead* and *Turner v. Calvert*. There the question arose in the same transaction; and if this doctrine be allowed, twenty cases of usury will have, perhaps, to be decided, before an action of *assumpsit* on a small promissory note can be tried. The answer to the English cases is, that they were Lord MANSFIELD's innovations, and that the old law was otherwise. *Skin. Rep.* 411; *Salk.* 22.

The opinion of the Court was delivered by

KENNEDY, J.—The first error is, that the note upon which the plaintiff below claims to recover in this action, had not become payable according to its tenor at the date of the impetration of the writ commencing the action. By an inspection of the record, the date certainly appears to be so, and therefore forms an insuperable objection to the plaintiff's recovery. The note is dated on the 30th December 1840, payable according to its terms 12 months after its date; and the writ was sued out on the 1st day of January 1842. Though, in general, when a deed mentions a month, it is construed to mean a lunar month, or 28 days, yet in bills of exchange, notes and other mercantile contracts, the rule is otherwise; and by the custom of trade, when a bill or note is made payable at a month or months after date, the computation must in all cases be by calendar and not by lunar months. 1 *Strange* 652: *Lang v. Gale*, (1 *Maule & Selw.* 111); see also 2 *Chit. Black.* 140 and note (3). And again, in the case of a bond made payable a year after its date, if not paid on the last day of the year, a suit for the recovery of its amount may be commenced the next day: but in respect to bills and notes it is otherwise; there three days of grace are allowed to the acceptor or drawer before he can be sued. *Bank of North America v. Pettit*, (4 *Dall.* 127); *Fisher v. Evans*, (5 *Binn.* 541). Originally they were called days of *grace*, because they were gratuitous, depending altogether on the will of the holder, and could not be claimed as a *right* by the person bound to pay; and although they still retain the name of grace, yet the custom of merchants recognised by law has long reduced them to certainty, and given the acceptor or maker a title to claim them as a matter of right. *Chitt. on Bills* 374. Allowing then the three days of grace to the defendant below, it is clear that the plaintiff there had no right to bring his action before the 3d of January, that is, not until after the three days of grace had fully expired. And accordingly the Supreme Court of New York held that an action brought against the *maker* of a promissory note on the third day of grace was prematurely brought, and that advantage might be taken of the error on the trial by nonsuiting the plaintiff. *Osborn v. Moncure*, (3 *Wend.* 170). Had this objection

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been brought to the notice of the court below, it is not likely that they would have rendered a judgment for the plaintiff, or have held that the defendant was bound to file an affidavit of defence in such cases. For it would be preposterous to hold that the defendant was bound or could be required under the Act of Assembly or Act of the court, to file an affidavit of defence, when it appeared from the plaintiff's own showing that he had no cause of action against the defendant at the time of commencing his suit.

The second error relates to the sufficiency of the defence set out by the defendant below in his affidavit of defence to a part of the plaintiff's claim, which was that he claimed to defalcate \$15.46 from the plaintiff's claim, that had been paid and allowed by him to the plaintiff as an excess of legal interest upon prior loans of monies made by the latter to the former. That money obtained by *oppression* and by taking advantage of the distresses of others, in violation of laws made for their protection, may be recovered back in an action for money had and received, seems to be well settled; because in such case the parties are not *in pari delicto*. *Lowry v. Bourdieu*, per Lord MANSFIELD, (*Doug.* 472); *Jones v. Barkley*, (*Id.* 697, note); *Mathers v. Pearson*, (13 *Serg. & Rawle* 258). And according to this principle it has been held that such action will lie to recover back the excess of interest taken from the plaintiff on an usurious loan to him. *Smith v. Bromley*, (*Doug.* 697, notes *a* and *b*); *Astley v. Reynolds*, (*Strange* 915); *Williams v. Hedley*, (8 *East* 378); *Rep. Temp. Talb.* 40, note; *Lofft* 345; *Browning v. Morris*, (*Coup.* 792). Seeing then that the defendant below might have maintained an action against the plaintiff for money had and received to recover back the \$15.46, excess of interest alleged to have been taken by the plaintiff below from the defendant, it cannot be questioned that under our Defalcation Act the latter may and has the right, if he chooses, to defalcate that sum from the plaintiff's demand. We therefore think that the court below erred in rendering a judgment against the defendant for the whole amount of the plaintiff's claim. Had not the plaintiff brought his action prematurely, and been willing to have accepted a judgment for the residue of his claim, after deducting the \$15.46, the court might have rendered judgment for such residue in favour of the plaintiff against the defendant, but not otherwise.

Judgment reversed.

Werkheiser *against* Werkheiser.

This court will not inquire whether an issue was properly directed by the Register's Court to the Common Pleas on a writ of error to the latter Court; they can only do this on an appeal from the Register's Court.

The Common Pleas may try such issue, though the defendant resist the making of the issue and refuse to plead.

Where a decedent was able to come down stairs to receive and converse with visitors and to walk in the street, and died the next day from a rupture of the lungs; *held* not to be such extremity of last sickness as authorized a nuncupative will under the 6th section of the Act of 8th April 1833.

The refusal of a new trial by the court below is not inquirable into on a writ of error.

It is no reason for not admitting a will to probate that its provisions may be obscure and uncertain.

A plaintiff in error cannot complain of the court's not answering a point which it was bound to answer against him.

ERROR to the Common Pleas of *Northampton* county.

This case came before the Register's Court on an appeal from the register. Sarah Werkheiser and Salome Werkheiser appeared before that court, the former alleging that David Werkheiser had made his nuncupative last will and testament, and the latter denying the same. Sarah, as the legatee named in the will, applied to the court to award an issue to the Common Pleas to try the questions of fact in the cause. Salome objected to the granting of the issue, that she did not deny any matter of fact stated in the evidence of Sarah, and that the question of fact upon which the issue was asked was not stated by Sarah. The court overruled the objection, and directed an issue to the Common Pleas, which court made up a feigned issue between Sarah as plaintiff, and Salome defendant, to try whether or not David Werkheiser, shortly before his death, made his nuncupative last will and testament, as set forth in the papers presented to the register. Salome refused to sign this issue, and protested against it as unauthorized by law, and as covering all questions to be decided by the Register's Court; and excepted to the form and substance of the issue, and the power of the Common Pleas to order it.

On the trial of the issue, Dr Field testified that he saw the decedent on the 26th of January 1842, walking in the street, in a very weak condition; and afterwards saw him sitting at his window, when he called the witness in, who told him he could not survive long. The decedent then stated that when he died, he wished his property to be divided as follows: That he wished his sister Sarah, with whom he then lived, to have the principal part of all he was worth, and the balance he wished to give to a poor sister, who had

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several children; that his mother should not have a cent of his property. During this conversation, no one else was present. On the 28th of January, about 2 o'clock P. M., the testator died from a sudden attack of congestion of the lungs, caused by a rupture. Another witness called on the decedent the day before his death, when the latter came down and unlocked the door, and both went up stairs. The decedent said he was weak and did not feel good; that after his death all he had should go to his sisters Sarah and Catharine; his mother should never have a cent; and he mentioned that he had spoken to Dr Field. No one else was present at this interview but a boy ten years of age. Another witness saw him walking the street the day before he died, and conversed with him; and thought he saw him in the street about 10 o'clock of the day he died.

Several other witnesses had conversations with the decedent in the latter part of December 1841, and on the 1st of January 1842, in which he said his property should go to his sisters Sarah and Catharine; that his mother should not have a cent of it; and that Catharine's share should be preserved for her children.

The defendant requested the court to charge:

1. That the alleged nuncupative will not having been made in the presence of two witnesses called on to attest it at one and the same time, and no two witnesses having testified to the same occasion of publishing the alleged will, the plaintiff cannot recover.
2. That if the decedent had full opportunity to make a written will, the plaintiff cannot recover.
3. That the will contains but one bequest, which is insensible and void, and cannot be carried out; and the plaintiff cannot therefore recover.

BANKS (President) charged the jury as follows:

The Act of Assembly in relation to nuncupative wills, requires that they should be made during the last sickness of the testator; that they should be proven by two witnesses who were present at the making of such will; and that the testator did, at the time of making the same, bid the persons present, or some of them, to bear witness that such was his will. These principles of law are applicable to and must govern this case. Was this alleged will made during the last sickness of the testator? Last sickness means a point of time in sickness approaching so near to death, as to leave neither reasonable time nor opportunity to the deceased to have made a written will during the remainder of his life. This is a fact for your determination. Evidence has been given of when this alleged will was made, and of the nature and stage of the disease, the condition of the body and mind of the deceased at the time, and how long he lived afterwards. Was, then, this alleged will made during the last sickness of the deceased? If it was not, it is not valid as a nuncupative will.

Have the witnesses agreed in their testimony as to the disposi-

[Werkheiser v. Werkheiser.]

tion of property made by the deceased? It is necessary that the two witnesses should agree as to what the will is; and unless two witnesses have so agreed in this case, there is no nuncupative will. You have heard all the testimony, and from it you will decide this fact. Has the nuncupation been proved by the requisite number of witnesses? This point has been much controverted by the counsel in their arguments to you and us. That a person should declare a disposition of his property *in extremis* in the presence of one witness, and bid him bear witness that such was his will, and that being done, would direct him to go and request a third person whom he named to come immediately and be a witness to his will, and this person having come he would repeat the same things to him as to the disposition of his property that he had to the other, and would also bid him bear witness that such was his last will, would appear to be very satisfactory and conclusive evidence that the man wished to make his will. It would indeed be strong evidence of an effort on his part to make a will, and would go as far to satisfy the minds of men as to the truth of the facts testified to, as if both witnesses had been present at one time, and had testified to the same facts as having taken place in their joint presence. To my mind it would be more satisfactory, for it would be repeating the same disposition twice instead of but once. It is not that proof and ceremony that would satisfy your minds or mine, that we are to follow as our guide in determining in this case whether there is a nuncupative will or not. In the absence of law, most men would be satisfied that the intestate had made a will, and feel a strong repugnance to the idea that his property should take any other direction than that which he had given it. It is not worth while, however, to spend time upon this point; for our Legislature in their wisdom have provided that every nuncupative will shall be made in the presence of two witnesses, who were present at the same time and called upon at the same time to attest the will. This settles the law and ends the question, and the points of law made by the defendant are therefore correct. Unless there were two witnesses present at the same time when the alleged nuncupative will was made, and called upon at the same time to attest it, there is no will. The law requires this, and you cannot dispense with it. The facts are for your decision.

The defendant excepted to the charge. The jury found for the plaintiff, and that the following was the nuncupative last will and testament of David Werkheiser: "I give and bequeath, and it is my will, that all my money and other property shall be given to my two sisters, Sarah and Catharine, and that my mother shall have no part thereof. The principal part of my property to go to my sister Sarah, and the balance to be secured for my sister Catharine and her children, so that her husband cannot spend it." The defendant moved for a new trial, which the court refused.

[Werkheiser v. Werkheiser.]

Errors assigned :

1. That the Common Pleas had no jurisdiction ; there being no dispute upon any matter of fact which the Register's Court were authorized to refer to them.

2. That as defendant resisted the making of the issue and filed no plea, the case was not at issue and was improperly tried.

3. The court erred in submitting to the jury whether the alleged will was made during last sickness, when there was no evidence of such last sickness, in the legal acceptation of the term, at the time of making the will.

4. In submitting to the jury whether the two witnesses had agreed in their testimony as to the terms of the will, when there were no two cotemporaneous witnesses as required by law.

5. The charge as to what the law was and what the law ought to be, was contradictory and calculated to mislead the jury.

6. The court erred in telling the jury that the facts were for their decision, when the only question was a question of law, and no facts were controverted.

7. In totally omitting to answer defendant's 3d point.

Reeder, for the plaintiff in error.

1 and 2. The Register's Court had no authority to direct an issue in this case, and the Common Pleas had no jurisdiction to try it. The depositions to sustain the will were all taken before the register, who refused probate, and an appeal was taken to the Register's Court, where no other evidence was taken than the depositions. We admitted all the facts contained in the depositions; there was no fact whatever disputed. The Register's Court were bound to decide on the law arising on the facts, and to declare the will not proved according to law. The Act of 15th March 1832, sect. 41, provides for an issue only to try matters of fact, and they cannot direct an issue to try matters of law before a jury. The effect of such a proceeding is to oust this court of its appellate jurisdiction over the probate. The court could not compel us to plead against our will.

3. But it is clear this was not a nuncupative will within the Act of Assembly. There was no evidence of last sickness, according to its legal meaning, the party being able to walk about and go out of doors, and in a situation to make a written will. It is settled, that to justify the making of a nuncupative will, the party must be in the extremity of last sickness, so that he has not time or opportunity to execute a written will, and it lies on the party setting up a nuncupative will to show that. *Yarnall's Will*, (4 Rawle 46); *Boyer v. Frick*, (4 Watts & Serg. 357); *Prince v. Hazleton*, (20 Johns. 503).

4, 5, 6. The court should have instructed the jury to find for

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the defendant, instead of leaving it to them to find the facts, none of which were disputed.

7. The court are bound to give a distinct and definite answer to points put. *Geiger v. Welsh*, (1 *Rawle* 349); *Freeman v. Pennock*, (3 *P. R.* 318). If the point was relevant to the issue, they were bound to answer, even though the answer would have been against the defendant.

J. A. Dunlap and Brooke, contra.

1 and 2. On this writ of error this court will not inquire whether the issue ought to have been directed. That could come in question only by appeal from the Register's Court, and cannot be examined collaterally. The effect of this error, if allowed, would be to obtain from this court the award of a new trial.

3. The court decided the law and left the facts to the jury, which was right. They were not bound to take the case from the jury and decide on the credibility of witnesses or other matters of evidence. The cases cited do not apply. In *Yarnall's Will* the *animus testandi* was absent, and the case was prior to the new code. In *Boyer v. Frick* the disease was hernia, which does not always prove fatal.

4, 5, 6. The court did not leave any distinct fact to the jury, but only recapitulated the evidence and proceeded to state the law. The whole charge must be taken together: and the court did all the defendant asked, except to take the case from the jury. Indeed, they did even that, by saying all the defendant's points were with him.

7. The court are not bound to answer a point which is plainly against the party proposing it.

The opinion of the Court was delivered by

SERGEANT, J.—The 1st and 2d errors assigned are inapplicable to the case as now brought before us by writ of error from the Court of Common Pleas. The only mode of inquiring whether the issue was properly directed would be by appeal from the Register's Court, who had full jurisdiction to direct an issue, and the Court of Common Pleas could not refuse to try it. We cannot inquire collaterally into the act of the Register's Court in directing this issue. Nor was it important in the Common Pleas that the defendant resisted the making of the issue or refused to plead. The issue was made up by the Register's Court in due form, and sent to the Common Pleas, and that was sufficient for them to proceed upon.

3. We think the 3d error fully sustained. The proper construction of this Act of Assembly was settled in *Boyer v. Frick*, (4 *Watts & Serg.* 357); and in *Yarnall's Will*, (4 *Rawle* 46), where it was decided that the intent and object of the Legislature in passing the Act must be taken into view in interpreting the words "last

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sickness," and that the object of the Act was to enable those only to make nuncupative wills, who by reason of the extremity of last sickness were unable to make written ones. That such was the case here there was not a particle of evidence to prove. At the time of the last conversation deposed to, the testator was able to go down to the door, return up-stairs and converse; and he complained only of weakness and not feeling well. Another witness thought he saw him, on the same day, walking in the street. On the next day a rupture of the lungs took place, and he died. The other conversations relate to a previous period of time. They all, it is true, go to show the intent of the decedent. But this is not enough. Every one who undertakes to make a testamentary disposition of his property, must conform to the law regulating such disposition; and if he does not take care to do so, the law cannot uphold it. Now the Act of Assembly requires that all wills shall be in writing, signed by the testator, and permits a verbal or nuncupative will only in extreme cases, where the party by the effect of disease is incapacitated from making a written will. To sanction a verbal will, where there is time to make a written one, would tend to the introduction of all the doubt, uncertainty, litigation, fraud and imposition which uniform experience has shown attend the allowance of verbal wills, in ordinary cases. It was error, therefore, in the court to leave to the jury without any evidence, to decide whether the alleged nuncupative will was made during the last sickness of the testator, when taking all the plaintiff's case as presented in the depositions to be true, there was no evidence whatever to show that it was made in such an extremity of last sickness as the Act of Assembly requires: and it was the right of the defendant to have from the court, in answer to his second point, an instruction to the jury to that effect.

4. The subject of this error does not seem material. For notwithstanding the court leave it to the jury to say whether two witnesses had agreed in their testimony, yet they afterwards very explicitly tell the jury that the legislative provision requires that a nuncupative will shall be made in the presence of two witnesses, who were present at the same time and called upon at the same time to attest the will, and that unless that were the case there was no will. The defendant cannot complain, therefore, of this part of the charge on the law, for it was all in his favour. His only ground of complaint would be that the court did not grant a new trial: but that is a part of the proceedings of the court below which is not inquirable into here on writ of error.

The 5th and 6th errors have been already substantially noticed.

7. The court were not bound to answer this point. It was irrelevant. It is no reason for not admitting a will to probate that its clauses and provisions may be obscure and uncertain. That

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is a matter for subsequent consideration in contests between the devisees and legatees, or with the heirs at law and next of kin. The plaintiff in error cannot complain of the court's refusing to answer a point which they were bound to answer against him. Writs of error are only for the relief of those who are aggrieved by the acts or omissions of the court.

Judgment reversed, and a *venire facias de novo* awarded.

Rittenhouse *against* Levering.

Where a surety has done no act before his claim is barred at law, manifesting his intention to put himself in the place of the original creditor and thereby subrogating himself to his rights, such as bringing suit on the bond within the six years or taking an assignment of it, his remedy is not on the bond but for money paid: and a court of equity will not after the six years subrogate him to the rights of the obligee.

A surety will be subrogated within the six years, where he has paid the money and the original security remains intact; and the fact that there was no assignment or actual substitution within that time will be disregarded; for while the legal right remains, it draws to itself all the consequences of an actual substitution in a court of equity.

A surety is not *ipso facto* on payment of the debt of his principal subrogated to the creditor's rights: his remedy is not *primâ facie* on the bond but for money paid.

Where a deed is joint or both joint and several, the defendant, who is sued, may show that the seal of one of the obligors has been torn off. But it is otherwise where the obligation is entirely several.

The monies paid to the distributees or the advancement to one or more of the children of the intestate form no part of an administration account.

The decree of the Orphan's Court confirming an administration account which admits a balance in the hands of the administrators for distribution, and in which as well as in the inventory filed one of the distributees is charged as a debtor, is *primâ facie*, but not conclusive evidence of such debt; and in an action by such distributee to recover his share of the estate, he may prove that he owed the estate nothing.

In relation to distribution of an estate, the District Court have concurrent jurisdiction with the Orphan's Court.

The District Court have jurisdiction of a suit by a distributee against the administrators for his share of the estate, where a final settlement has been made of their accounts in the Orphan's Court, showing a balance in their hands for distribution.

A surety of a surety who has paid and discharged the obligation, has the same equity of subrogation as the surety to whom he was bound.

ERROR to the District Court for the city and county of Philadelphia.

[Rittenhouse v. Levering.]

This was an action of *assumpsit* brought by Joseph Rittenhouse against Nicholas Rittenhouse and Jacob D. Rittenhouse, administrators of Martin Rittenhouse, deceased, the grandfather of the plaintiff, to recover a distributive share of the estate of the intestate. It appeared that Martin died in 1829, leaving six children known to be alive and three grandchildren, one of whom was the plaintiff, the issue of a seventh child, Joseph, who was supposed to be dead. The plaintiff died *pendente lite*, and his administrator was substituted.

This case was tried three times. On the first trial a verdict was rendered for the plaintiff, subject to the opinion of the court. This verdict was set aside and a new trial granted, in which a verdict and judgment were rendered for the defendants. This judgment was reversed on a writ of error taken to this court by the plaintiff, and a *venire de novo* awarded. See 4 *Whart.* 130. On a third trial a verdict and judgment were rendered for the plaintiff.

The declaration contained four counts, of which two were for money had and received. The third count stated, that "whereas the said Martin died intestate, &c. leaving neither widow nor lawful issue, nor father nor mother, but leaving brothers and sisters and leaving the said Joseph, who was the representative of a brother of the said Martin, and the said Joseph as representative of a brother of the said Martin, was entitled to receive of the remaining part of the lands, &c. and personal estate of the said Martin, &c. And the said, &c. administrators, &c. had in their hands assets sufficient to pay the said distributive share," &c.

The fourth count stated, that "whereas the said Martin died intestate, &c. leaving no widow, but leaving children and the representatives of a child: and whereas the said Joseph, &c. was one of three children of a certain other Joseph Rittenhouse, which other Joseph was a son of the said Martin and died in the lifetime of the said Martin, leaving the said Joseph, &c. alive at the time of the death of said Martin and the said Joseph, &c., as one of the grandchildren of the said Martin, his grandfather, was and is entitled to receive of the remaining part of the lands, &c. and personal estate of said Martin, &c. and the said administrators had assets sufficient to pay, &c. the said distributive share."

The plaintiff gave in evidence the inventory and appraisement of the personal estate of Martin Rittenhouse, amounting to \$8969.32½, the last item of which was: "Joseph Rittenhouse, Dr to sundry charges \$4465.75." Also the following account:

[Rittenhouse v. Levering.]

DR. *Nicholas Rittenhouse and Jacob D. Rittenhouse, Administrators to the Estate of Martin Rittenhouse, late of Roxborough Township, deceased, in Account with said Estate.*

CR.

The said accountants charge themselves with amount of inventory filed in register's office	\$8969	32	The said accountants crave allowance for the following disbursements made out of said estate aforesaid, to wit:		
To interest received on personal and real estate	1147	92	By cash paid register for letters of administrat'n	\$	2 75
" advance on sale of personal estate	46	76	" cash paid for expenses of funeral, per receipts		132 18
" debt due by Nich. Rittenhouse to estate	292	31	" amount allowed Jacob C. Rittenhouse		27 50
" debt due by Jacob D. Rittenhouse to estate	658	80	" cash paid for stating account to Murphy		3 00
Estate in Montgomery county, sold by order of Orphans' Court	2751	00	" cash paid for stating second account		3 00
			Register's fees, and fees Clerk Orphans' Court		9 69
			Commissions allowed administrators for their care and trouble in settling said estate, on \$13,866.11		250 00
			Balance in the hands of administrators to be distributed according to law		13437 99
	\$13866	11			\$13866 11

DR. *Nicholas Rittenhouse and Jacob D. Rittenhouse in Distributive Account with the Heirs of Martin Rittenhouse, dec'd.* CR.

To balance due estate brought down	\$13437	99	By so much paid Thos. Ulmstead, per receipt.	\$	1484 00
Property in Philadelphia co., real estate, valued by sheriff's inquest at	9600	00	" Joseph Rittenhouse		4465 75
			" Susan Nixon		1525 92
			" Philip Reynar		1060 00
			" Martin Rittenhouse		1503 30
			Balance due heirs		12999 02
	\$23037	99			\$23037 99

The said administrators, duly affirmed, say that this account, as it stands stated and settled, both as to their charge and discharge thereof, is just and true to the best of their knowledge and belief.

NICHOLAS RITTENHOUSE,

JACOB RITTENHOUSE.

Affirmed and subscribed before

me, May 7, 1830.

B. SEWALL, Dep. Register.

Philada. City and County, ss.

I certify the foregoing to be a true copy of the original account, as filed in the Register's Office for the city and county of Philadelphia.

Given under my hand and seal
of office, this 25th day of
April, A. D. 1832.

J. HUMES, Register.

This account was confirmed *nisi* by the Orphans' Court on the 18th of June 1830, and no exceptions to it appeared to have been filed.

The plaintiff then called a witness who stated that he saw

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Joseph Rittenhouse, the elder, in Maryland, in November 1819; that he left home more than four or five years previous.

The defendants then gave in evidence an account or memorandum, admitted to be in the handwriting of Joseph Rittenhouse, in which he was charged with several sums of money as due from him to Martin Rittenhouse. Also an account stated between Martin and Joseph, dated 19th August 1794, in which certain errors were corrected, and the balance stated in Joseph's handwriting. Also a receipt in the handwriting of Joseph, with the endorsements in the handwriting of Martin, for Peter Care's note, dated 10th January 1795. Also a bond, with the endorsements thereon, dated 17th September 1792, given by Joseph and Jacob Rittenhouse to John Johnson for the payment of £500 with interest on the 17th September next ensuing its date. The name and seal of Jacob to this bond had been erased. The last receipt endorsed on the bond was in these words:

Rec'd 1st mo. 2d 1812, of Nich's Rittenhouse, the amount of the within bond, both principal and interest, in full.

JOHN JOHNSON.

They also gave in evidence a bond dated 1st February 1794, given by Joseph and Martin Rittenhouse to Jacob Rittenhouse, reciting the former bond, and that Jacob became bound in it with Joseph at his special instance and request. The condition was that Joseph should pay John Johnson £500 on 7th September next ensuing, and that Joseph and Martin should save harmless and indemnify Jacob from all damages, &c., which he might thereafter be put to by reason of his being bound with Joseph. The seal of Martin to this bond had been torn off.

The defendants then called one of the executors of Jacob Rittenhouse, who testified that Nicholas Rittenhouse, as the agent of his father Martin, paid witness the original bond in 1812, and witness gave him up the indemnifying bond. At the time Nicholas brought the bond, he said that he paid it for his father. Witness did not recollect of Joseph's being in that part of the country at that time.

Another witness then stated that Joseph Rittenhouse left home about 1785 or 1788, and that Martin said he had not heard from him since the burning of the Richmond theatre.

The defendants then gave in evidence the record of the Orphans' Court of the county of Philadelphia, showing that the above-mentioned account settled by the defendants as administrators of Martin Rittenhouse, had been confirmed *nisi* by the Orphans' Court on the 18th June 1830, and no exceptions had been filed thereto.

The defendants requested the court to instruct the jury on the following points:

1. That even if the bond to John Johnson was paid by Martin

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Rittenhouse, as the surety of Joseph Rittenhouse, before the death of Joseph, the debt, which thus became due from Joseph to Martin, was not barred by the Act of Limitations.

Answer. This is not correct; the law is directly otherwise.

2. That the decree of the Orphans' Court upon the accounts of the defendants as administrators of Martin Rittenhouse, deceased, was conclusive, and that therefore the plaintiff was not entitled to recover.

Answer. I negative this proposition also.

The defendants assigned the following errors.

1. The judge erred in his answer to the first question submitted to him by the defendants.

2. In his answer to the second question submitted to him by the defendants.

3. There was no allegation on record, nor was there any proof, that a final settlement of the accounts of the defendants as administrators of Martin Rittenhouse, deceased, had been made in the Orphan's Court, and the clear balance for distribution ascertained, without which the court below had no jurisdiction of the subject-matter of the suit.

4. It appears from the record that the court below had no jurisdiction of the subject-matter of the suit.

5. The several counts in the declaration, particularly the third and fourth, are utterly incongruous and inconsistent with each other; and the verdict on which the judgment below was entered being general, the said judgment is erroneous.

The cause was argued at December Term 1842 by *Brooke* and *Rawle* for the plaintiffs in error, and by *Jack* and *Randall* for the defendant in error; and was now re-argued by

Rawle, for the plaintiffs in error. A surety who has paid the debt of his principal, is entitled to be subrogated to all the rights of the creditor without any actual assignment of the security. The right of substitution is everything, the actual substitution nothing. Payment of the debt by the surety does not extinguish the security: equity keeps it alive for his benefit. *Millard v. Cheesebrough*, (1 Johns. Ch. 409); *Hayes v. Ward*, (4 Ib. 130); *Avery v. Petten*, (7 Ib. 211); *Fleming v. Beaver*, (2 Rawle 131); *Cooper* 61; *Burns v. Huntingdon Bank*, (1 P. R. 395); *Mehaffy v. Share*, (2 Ib. 378); *Dorsheimer v. Bucher*, (7 Serg. & Rawle 9); *Sterling v. Brightbill*, (5 Watts 231); *Kyner v. Kyner*, (6 Ib. 224); *Croft v. Moore*, (9 Ib. 451). The exceptions to the rule are founded on particular circumstances, such as omitting to sue within the period of limitation, or paying only part of the debt: *Bank of Pennsylvania v. Potius*, (10 Watts 148); or the existence of intervening creditors. *Pott v. Nathans*, (1 Watts & Serg. 155); *Himes v. Keller*, (3 Ib. 401). Here the intestate paid the bond for his son Joseph, and claims to be substituted to the rights of Johnson, the obligee. The tearing off

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his seal was no more than a payment and receipt, and does not extinguish the security in equity.

The decree of the Orphan's Court confirming the account of an executor is conclusive as to all matters contained in it, in an action for a distributive share or in any collateral suit. *M'Fadden v. Geddis*, (17 *Serg. & Rawle* 336). It is not sufficient to say there are irregularities on its face: these could be rectified only on appeal, and cannot be inquired into in a suit for a distributive share, whether they are matters of charge or of discharge. *M'Pherson v. Cunliff*, (11 *Serg. & Rawle* 422); *M'Lenachan v. Commonwealth*, (1 *Rawle* 361); *M'Pherson's Adm'rs. v. Rees*, (2 *P. R.* 521); *Clark v. Callaghan*, (2 *Watts* 259); *Snyder v. Markel*, (8 *Ibid.* 416); *Gallaher v. Collins*, (7 *Ibid.* 552); *Richter v. Fitzsimmons*, (4 *Ibid.* 251); *Galbraith v. Galbraith*, (6 *Watts* 112); *Blanchard v. The Commonwealth*, (6 *Watts* 309). The decree of the Orphan's Court was held conclusive before the passage of the Act of 29th March 1832, and now, by the 2d section of that Act, it is expressly made so.

If, then, the Orphan's Court has passed on all these matters, and decreed that the debt of \$4465.75 was due by Joseph, and found the balance due the heirs, the District Court cannot entertain the question of the existence of the debt. That is a fact appearing by the record, and cannot be disputed. *Selin v. Snyder*, (7 *Serg. & Rawle* 172); *Kennedy v. Wachsmuth*, (12 *Ibid.* 171). The Orphan's Court may have considered it either as an advancement or payment, and if they even improperly considered it as a payment, it is binding on all who stood by and did not assert their rights by coming in and excepting to the account, and thereby lulled the administrators into security, and induced them to go on and distribute the estate. To such a proceeding all who are interested are parties, and have a right to be heard, and are bound to come in under the advertisements. It is in the nature of a proceeding *in rem*. Even the Orphan's Court could not modify their decree after money had been paid under it, so as to make a party pay a second time. *Hassler's Appeal*, (5 *Watts* 176). The adjudication of the account of the personalty was clearly within the jurisdiction of the Orphan's Court, and under the Acts of 1713 and of 19th April 1794, the balance of sale of real estate must be ascertained in the Orphan's Court, whose duty it is to allow credits to the administrator for payments made to the heirs or distributees. *Sterrett's Appeal*, (2 *P. R.* 419); *Fromberger v. Greiner*, (5 *Whart.* 350).

He further insisted that as the account, if final, was conclusive, so if it was alleged not to be final, the suit in the District Court was premature. All the cases show that a balance must be first settled there before an action at law can be brought. *Wilson v. Wilson*, (3 *Binn.* 557); *App v. Driesbach*, (2 *Rawle* 301); *M'Lenachan v. Commonwealth*, (1 *Rawle* 361); *Purviance v. The Common-*

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wealth, (17 *Serg. & Rawle* 31); *Earnest v. Earnest*, (5 *Rawle* 213).

The declaration is defective. One count blends together the real and personal estate, and the titles laid in the two special counts are incongruous.

Randall, contra, insisted that the right of subrogation was not made a question in the court below, and did not arise on the points put for the instruction of the court. The first point was merely as to the simple contract debts being barred by the Statute of Limitations. The principle asked by counsel must be precise, so as to raise the question. 15 *Peters* 406; 14 *Ibid.* 321; *Wolverton v. Commonwealth*, (7 *Serg. & Rawle* 277). The court below had no opportunity to examine the subject of subrogation; it is new. Besides, upwards of twenty-two years had elapsed before the suit, and the presumption of payment, once commencing, runs on. *Galbraith v. Galbraith*, (6 *Watts* 112). The doctrine of subrogation, however, does not apply. The payment by Martin was voluntary. He was not surety to Johnson, nor liable to him. He gave the bond to Jacob two years after Jacob's bond to Johnson. There was no privity between Martin and Johnson by which the former could step in and pay and thus be subrogated to Johnson's rights. But, in addition, it is a conclusive objection that more than six years had elapsed from the time of the payment by Martin, and his claim against Joseph, at law, was gone. The legal claim being extinct, there is nothing on which the equity of subrogation can arise. The moment the legal liability is gone, the right of substitution ceases. *Fink v. Mahaffy*, (8 *Watts* 384); *Bank of Pennsylvania v. Potius*, (10 *Watts* 148). The tearing off the seal or erasure of a joint and several bond destroys it, and the defendant may show it. 2 *Stark. Ev.* 379.

The second error is also too general: no precise point is put. But an administration account is conclusive only as to matters properly introduced into it. *Kohr v. Fedderhaff*, (4 *Serg. & Rawle* 248); *Foulk v. Brown*, (2 *Watts* 214); *M'Cullough v. Montgomery*, (7 *Serg. & Rawle* 31). In *Sterrett's Appeal* and *M'Clenachan v. Commonwealth*, principally relied on, the distinction is between assets and distribution. It is impossible Joseph could have been paid as the account states, as he was absent and supposed to be dead. Certainly, merely putting such an item in the account would not bar him any more than it would a stranger. An administration account can only be conclusive of debits and credits and balance struck. If payments to third persons be interpolated, when such payments were never made, they are not barred by it. *Foulk v. Brown*, (2 *Watts* 214); *Levering v. Rittenhouse*, (4 *Whart.* 130). The last of these cases settles that the \$4465.75 was not an advancement to Joseph but a debt due by him, which we have a right to show was barred by the Statute of Limitations. Its being

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inserted in the inventory and account does not deprive him of the right of showing that.

As to the counts, they only state the title differently, which is the common practice. The claim is the same, the pleadings and judgment are the same, and each count is good by itself. *Arch. Plead.* 172; 1 *Chitt. Plead.* 393. The insertion of the proceeds of real estate was but surplusage, and was struck out in the charge and verdict. There was a former verdict on the same narr. and no objection was taken.

The opinion of the Court was delivered by

ROGERS, J.—The declaration contains four counts; first, money had and received, and special counts claiming a distributive share of the personal estate and a distributive share arising from the real and personal estate. The monies arising from the real estate were not taken into the calculation of the jury, and a verdict was rendered for the plaintiff's share in the personal estate only. The principal questions are raised by the charge on the Act of Limitations and the conclusiveness of the decree of the Orphan's Court. On the 17th September 1792, Joseph Rittenhouse and Jacob Rittenhouse gave a bond to John Johnson in the penal sum of £1000, conditioned to pay £500, with interest. Afterwards, viz. on the 1st February 1794, Joseph Rittenhouse, the father of the plaintiff's intestate, and Martin Rittenhouse, the defendants' intestate, executed a bond to Jacob Rittenhouse in the sum of £1000, conditioned to indemnify and save harmless Jacob, who was the surety, from the payment of the above-mentioned bond. Martin, who was the father of Jacob, paid the bond for Joseph, under whom the plaintiff claims, and this constituted one of the items of defence.

This case has been twice tried, and on the first trial the plaintiff's claim was met by the plea of the Act of Limitations. The Supreme Court, to which the case was taken by writ of error, decided that if a surety pays the debt of his principal after the death of the latter, and where no letters of administration have been taken out upon his estate, the Statute of Limitations does not begin to run until letters of administration are taken out. 4 *Whart.* 130. Under this direction the parties went to trial, and, it is insisted, that the first point was intended to raise the same question which had been already ruled. The District Court would seem to have been of this opinion, and, as we think, on good grounds; for the prayer of the defendant, fairly construed, embraces that point only, and it is conceded that no new view was taken on the argument. Indeed, the point appears to have been submitted to the court without any argument whatever. It looks very much like an experiment to test the decision on the first trial. It is, however, now said, that no new position is taken, but an additional argument is urged, bearing directly on the plea of the Act of Limitations. Conceding this to be as stated, we will exa-

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mine the question on the position taken by the defendant. The allegation, as I understand it, is, that by the payment of the bond the surety is *ipso facto* subrogated to all the rights of the obligee, and by that operation, without more, he becomes a specialty creditor. From this it follows that the Act of Limitations does not apply, as the administrators, on this hypothesis, are only barred by presumption of payment arising from lapse of time. The defendants allege that the right of substitution is everything, and actual substitution is nothing. The general proposition in *Fleming v. Beaver* is conceded, with certain limitations which we have been compelled to make in subsequent cases. Thus in *Fink v. Mahaffy*, (8 Watts 384), it is held that the doctrine of substitution being one of mere equity and benevolence, will not be enforced at the expense of a mere legal right: a surety, therefore, whose claim against his principal for money paid on a judgment against them has been defeated at law, cannot be substituted for the plaintiff in the original judgment. This case is recognised in *The Bank of Pennsylvania v. Potius*, (10 Watts 152), and must, therefore, be considered as settled. Where the surety has done no act before his claim is barred at law manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to his rights, the remedy is only for money paid. Where he has omitted to bring suit in proper time, or to do some acts equivalent thereto, he cannot afterwards be subrogated to the rights of the creditor. (It is a general principle that equity follows the law, and where right does not exist at law, a Court of Chancery will not afford the party equitable relief.)

In addition to this ground, an insurmountable difficulty arises from the cancellation of the bonds by the erasures of the signatures of Jacob and Martin. By whom the erasures were made, does not appear, nor is it material. That such an erasure destroys the validity of a bond, has been repeatedly ruled; and this is a conclusive answer to the attempt to subrogate the surety to the right of the creditor; and this results from the act of cancellation, independently of the intention of the parties. When a deed is a joint one, or both joint and several, the defendant, who is sued, may show that the seal of one of the obligors has been torn off, for the manner of the obligation becomes different, and a presumption arises that the obligee has been satisfied. But it is otherwise where the obligation is entirely several. 2 Stark. Ev. 379, 380; 2 Show. 29; Bac. Ab. title "Evidence," 652; Bul. N. P. 268. The case of *Seaton v. Henson*, (2 Show. 29,) where this principle was first applied to a joint and several obligation, was this. Four persons were bound in a joint and several bond, and did each of them seal and deliver the same. The seal of one was broken off. The obligee sues the defendant whose seal was still affixed to the bond. He pleads the special matter, and concludes *non est factum*. The question was if the bond hereby became void as to all the obligors,

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or only to him whose seal was torn off. The court decided it entirely destroyed the bond.

If the bond is null and void, it is difficult to imagine what remains on which the subrogation can operate. By a subrogation, the surety is placed in no better situation than the obligee; and as he could recover nothing, the surety is placed in the same predicament. Subrogation of a surety, where he has paid the money and the original security remains intact, has been so repeatedly ruled that it is not now an open question; and although the surety in the case in hand was one remove from the original creditor, yet in a proper case we see no objection to subrogate him to the rights of the obligee. Having paid and discharged the obligation, he has the same equity as the surety to whom he was bound. A payment by him can in no case be considered voluntary; for a payment by a person who can be compelled to pay is not voluntary, so as to debar the party paying from a right of action. It may be his only mode to save himself, and from the moment the money is paid, the right of action against the obligor is complete. Why, therefore, the benefit of a principle which is based in equity should be denied to him, it is difficult to perceive. It throws the obligation on the person bound to pay, by placing the surety in the situation of the original creditor. But in this case, so far as appears, the surety did no act manifesting any intention whatever to avail himself of the equitable principle which is now invoked for the protection of his administrators. The reverse would indeed seem to be the case. He took no assignment of the bond; commenced no suit upon it. On the contrary, the bond itself is destroyed by the erasure of the name and seal of one of the co-obligors. If the obligation had been in a perfect state, and a suit had been brought upon it in proper time, the principle asserted in *Fleming v. Beaver* would apply. The fact that there was no assignment or actual substitution on the bond, would in such a case be disregarded; for while the legal right remains, (that is, as ruled in *Fink v. Mahaffy*, and *The Bank v. Potius*, for six years,) the right draws to itself all the consequences of an actual substitution in a court of equity.

Although I am not aware that this precise point has been elsewhere so ruled, yet it is inconceivable to me that a court of chancery would undertake to decree a substitution at any distance of time, and after all remedy in a court of law was barred; for there would be one rule of property in one court, and a different rule in another court. But rules of property are the same in all courts; for the well-settled principle is that, except as to the remedy, equity follows the law. The error on this head arises from the assumption that *ipso facto* on payment of the money, the surety is subrogated to the rights of the creditor; whereas the remedy is not *primâ facie* on the bond, but for money paid: although the surety may, if he chooses, invoke the aid of the equitable principle

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of subrogation. A contrary doctrine, and particularly in the case of judgment creditors, would be inconvenient, if not productive of injustice. It would be a manifest hardship in many cases to destroy the lien of a junior judgment creditor, who may know of the actual payment of a prior judgment and act on that knowledge, and to subrogate a surety to the rights of the prior judgment creditor at any time before the expiration of twenty years. In the distribution of money arising from sheriffs' sales, we have difficulties enough already without superadding another, rendering it almost impossible to know when junior judgment creditors are secure. There is neither injustice nor hardship in putting sureties on the same footing as others. A surety may lose a right by his neglect, and more especially where by his supineness he jeopardizes the rights of others.

But is the decree of the Orphan's Court conclusive? In the inventory, Joseph Rittenhouse is returned as a debtor to the estate of \$4465.75. The accountants charge themselves with the amount of inventory, and the account as settled shows a balance in the hands of the administrators to be distributed according to law of \$13,437.99. Appended to the administration account is a statement headed "Nicholas Rittenhouse and Jacob D. Rittenhouse in distributive account with the heirs of Martin Rittenhouse, deceased." An administration account properly settled shows nothing more than the general balance due the heirs after a reduction of the personal estate into cash or its equivalent, and the payment of the debts. Into that account the monies paid to the distributees, or the advancement to one or more of the children, do not enter. They form no part of an administration account. A total disregard of this obvious distinction causes most of the perplexity which attends such settlements. After a final adjustment, the practice is to decree a distribution among the heirs according to law. It is a general decree; for the court do not undertake to ascertain who are the heirs, or what proportion each is entitled to. And it would be most dangerous to do so, and more especially when the only matter which is properly before them is to settle and adjust the general balance due from the administrator, and to ascertain the nett proceeds of the personal estate to which the distributees are entitled. The administrator may annex a statement of the monies paid to each of the heirs, so that it may appear that the apparent is not the real sum due. But this he is not bound to do. It constitutes no part of the decree, nor does it bind any human being, except, perhaps, the administrator himself. After the decree, however, the Orphan's Court may proceed to enforce payment, and where this is required by any of the parties interested, in order to do justice, it is necessary to investigate the state of the account of the administrator with each of the heirs; and it is plain that justice only can be done by keeping the accounts of each separate and distinct; for one may

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have received his whole share, another part, and a third nothing. In *Purviance v. The Commonwealth*, (17 Serg. & Rawle 31), it is held that the Orphan's Court has jurisdiction of the matter of distribution, and is bound to decree distribution on the petition of any one interested, though the usual mode, as is truly said, is by an action at common law. But before making this distribution, the Orphans' Court should require that such notice should be given to all the parties not before the court, as the nature of the case admits of. And this is necessary; for a final distribution of the estate requires great circumspection, and sometimes involves most interesting, doubtful and perplexing questions; and hence the propriety of avoiding to confound it with a proceeding so entirely different, and intended for an entirely different purpose.

But in this essential respect how lamentably deficient is that part of the account which is called by the plaintiff a distribution of the estate among the heirs! It in fact is part of the administration account blended with it, and it is very evident that no other notice to the parties was ever given, except the notice of the settlement of the administration account. No one petitioned the court for that purpose, nor has any notice been given of the specific object, viz., to ascertain and decree the amount to which each was entitled as his distributive share of the estate. This is so plain on the face of the account itself, that it cannot admit of any doubt whatever. But to bind the heirs as a conclusive decree of distribution, the general balance of the estate in the hands of the administrator for distribution must in the first place be ascertained. After this is done, if any one of the heirs wishes a distribution to be made by the court making the decree, he may petition the court for that purpose, have the parties before the court, and a decree made adjusting the sum due to each. Besides, in the distributive account, as it is termed, the real estate, as valued by a jury of inquest, is blended with the personal estate. For these reasons I throw out of view the distributive account, as it is called, and also the proceedings on the writ of partition. The case, therefore, comes down to this. An administration account is settled in due and regular form, and the Orphan's Court decrees in the hands of the administrator for distribution \$13,866.11. Is this, the decree of the Orphan's Court on this state of facts, conclusive? or, in other words, is the plaintiff, notwithstanding the decree, he being returned in the inventory as a debtor and charged in the administration account with the same, at liberty to controvert the alleged debt by proof that he owes the estate nothing?

That the decree of the Orphan's Court is conclusive, is an elementary principle not now open to doubt; but of what it is conclusive, and whether it concludes a party from alleging the truth to the extent claimed by the plaintiff in error, is not so clear. That it is conclusive of every item or thing in the account as against the whole world, will not be pretended. For example,

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the debts due the estate form part of every inventory, and are brought into the administration account; and yet no person has ever supposed that although they are treated as part of the assets by the administrator, the debtor is prevented from proving that no debt existed, and that he owed the estate nothing. In whatever manner or with what solemnity and regularity the account is settled, yet the debtor is not precluded from any defence which he may have against the claim. This is conceded; but it is alleged that a distributee, who is a debtor, is placed in a different situation; that he is governed by different principles; because, as is said, being a party to the decree, his time to object is before the decree made, and being silent then, he cannot afterwards collaterally question the decree by a denial of the existence of the debt in another forum. It must be confessed, there is great force in the position; but, on the most anxious and deliberate reflection, I incline to the opinion that although evidence, it is not conclusive evidence of indebtedness. In the case of an ordinary debtor, it would be no evidence whatever; but where the debtor is at the same time distributee, it will best subserve the purposes of justice to consider the decree in that particular as *primâ facie*, but not conclusive evidence of the debt. The debtor, although distributee, should be at liberty to rebut the *primâ facie* proof by evidence that destroys the claim. Although the legal presumption is that the parties to the decree examine the account, and are acquainted with each item of which it is composed, yet in practice, and especially where some of the heirs reside out of the State, it is far otherwise. In forming an opinion on such a question, we must have regard to the known habits of doing business; and unless we sometimes yield to circumstances, the most glaring injustice will be the inevitable result; for frequently absent distributees may find themselves deprived of their patrimony by omitting a particular examination of an account in which they may be falsely charged as debtors to the estate. At any rate, before they can be precluded from alleging the truth, they have a right to require that all the forms of law intended for their protection should be pursued. In relation to distribution, the District Court has a concurrent jurisdiction with the Orphan's Court; and I can hardly suppose that if the parties had thought proper to proceed in the latter instead of the former court, they would have thought themselves prevented from inquiry into the indebtedness of a distributee, merely because he had been returned in the inventory as a debtor, and that had formed one item of the administration account.

The remarks already made dispose of the third and fourth errors. There was a final settlement of the accounts of the defendants as administrators, and a clear balance, viz., \$13,866.11, ascertained. From this it results that the District Court had jurisdiction of the subject-matter of the suit.

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It remains to consider the fifth error: that the several counts in the declaration, particularly the third and fourth, are utterly incongruous and inconsistent with each other, and the verdict on which the judgment below was entered being general, is erroneous. This error is not entitled to much favour, as we are aware that the evidence on the exceptionable counts, I mean those relating to the real property, was thrown out of the calculation by the jury. But the error is not sustained, because the counts are not incongruous and inconsistent with each other. Several counts may be joined in the same declaration. The plea and judgment are the same. It would be useless, particularly after a second trial, to send the cause back on such an objection. It is usual, particularly in *assumpsit*, debt on simple contract, and action on the case, to set forth the plaintiff's cause of action in various shapes in different counts, so that if the plaintiff fail in the proof of one count, he may succeed in another. 3 *Blac. C.* 395; 1 *Chitty P.* 399. The error assigned must be taken as a whole; and as the counts are not incongruous and inconsistent, although the verdict is general, we would not feel ourselves justified in reversing the judgment on that ground.

Judgment affirmed.

Green against Howell.

Testator after giving his wife an annuity directed his executors "to ascertain how much has been advanced by me to each and every of my children, &c. and how much each of them may be indebted to me on bond, note, book-account or otherwise, and to so divide the residue of my said property among my said children, &c. as that each child may have an equal share of my estate; that is, that the monies so advanced to any of my said children, &c. and for which they shall be indebted to me as aforesaid, be counted as so much paid on account of the share of such child in my estate," &c. The testator at his death held notes of each of his sons, a book-account against one, and a bond and warrant of his son-in-law never entered up. On one of the notes he had received a year's interest eight years before the date of the will: on the others no interest was ever paid. *Held*, that the will converted the notes and bond and book-account from debts into advancements, and that no interest was chargeable on them.

ERROR to the Common Pleas of Northampton county.

An amicable action was entered between Enoch Green and John Stewart, executors, &c. of Eseck Howell, deceased, plaintiffs, and George G. Howell, defendant, in which the following agreement was filed:

"Whereas the said Eseck Howell at the time of his death held a note against the said George G. Howell, due and unpaid, for the

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sum of \$3892, which by the last will and testament of the said Eseck Howell, deceased, duly proved, &c. is to be deducted from the share coming to the said George G. Howell out of the estate of the said Eseck Howell, deceased. And whereas there is a disagreement between the said executors and the said George G. Howell, whether under the said will interest should be charged upon said note or not. It is hereby agreed that an amicable action in case be entered in the Court of Common Pleas of Northampton county of the term of April 1843, between the above parties, and the question whether interest should be charged upon the said note be submitted to the decision of the said court, with liberty to either party to take a writ of error from said decision to the Supreme Court, the said note and will to be taken as part of this case. If the court shall be of opinion that interest is chargeable upon the said note, then judgment to be entered for the said plaintiff for the amount due thereon to be ascertained by the prothonotary; but if in the opinion of the court no interest is chargeable on said note, then judgment to be entered for the defendant."

At the same time three other amicable actions were entered in said court to ascertain the same question, one, No. 98 of April term 1843, between said plaintiffs and Joseph Howell, reciting that, "whereas the said Eseck Howell at the time of his death held two notes against the said Joseph Howell for money received by him the said Joseph Howell of the said Eseck Howell, one for the sum of \$1000 and the other for the sum of \$2000, and also a book-account for the sum of \$700.73, all which said notes and accounts were then, and yet are due and unpaid, and to be deducted out of the share coming to the said Joseph Howell out of the estate of the said Eseck Howell, deceased." Another between the said plaintiffs and Lorenzo Howell, upon agreement, reciting that, "whereas the said Eseck Howell at the time of his death held three notes against the said Lorenzo Howell, due and unpaid, one for \$1000, one for \$200, and the other for \$1000, amounting together to the sum of \$2200, which by the last will and testament of the said Eseck Howell, deceased, duly proved, &c. is to be deducted from the share coming to the said Lorenzo out of the estate of the said Eseck Howell." And another between said plaintiffs and Peter S. Michler, on agreement, reciting that, "whereas the said Eseck Howell at the time of his death held a bond against the said Peter S. Michler in the penalty of \$3000, conditioned for the payment of \$1500 on the 7th day of January 1826, with interest, accompanied by a warrant of attorney to confess judgment for the amount of said bond, which by the said will is to be deducted from the share of said estate to be paid to the trustee of Mrs Mary Michler, wife of the said P. S. Michler," all of said agreements continuing as the said first mentioned agreement to the end.

The notes and obligations referred to in said agreements were produced by the plaintiffs, and were as follows:

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Easton, December 25, 1827.

\$3892

Twelve months after date I promise to pay to Eseck Howell three thousand eight hundred and ninety-two dollars, without defalcation, for value received.

GEORGE G. HOWELL.

(Endorsed) "1829, Received December 29th two hundred and thirty-three dollars and fifty-two cents, being the interest on the within note for one year.

E. HOWELL."

Easton, October 18th, 1831.

\$1000

Thirty days after date I promise to pay to Eseck Howell or order one thousand dollars, without defalcation, for value received.

JOSEPH HOWELL, JUN.

Easton, October 3d, 1832.

\$2000

Five days after date I promise to pay to the order of Eseck Howell two thousand dollars, without defalcation, for value received.

JOSEPH HOWELL, JUN.

Easton, February 14th, 1835.

\$200

Sixty days after date I promise to pay to Eseck Howell or order the sum of two hundred dollars, without defalcation, for value received.

LORENZO HOWELL.

Lower Mount Bethel, April 9th, 1835.

\$1000

Ninety days after date I promise to pay to Eseck Howell or order the sum of one thousand dollars, without defalcation, for value received.

LORENZO HOWELL.

Lower Mount Bethel, February 19th, 1835.

\$1000

Ninety days after date I promise to pay to Eseck Howell or order the sum of one thousand dollars, with legal interest, without defalcation, for value received.

LORENZO HOWELL.

Bond and warrant of attorney, Peter S. Michler to Eseck Howell, dated January 7, 1825, in penalty of \$3000, conditioned for payment of \$1500 on the 7th of January 1826, with lawful interest for the same from the date hereof.

No judgment was entered on this.

Book-account, Joseph Howell, \$700.73.

The said testator died leaving a widow and seven children surviving, viz. the said George, Joseph and Lorenzo Howell, Mary, wife of the said Peter S. Michler, Amanda, intermarried with Edmund B. Mixsell, Susannah and Ann Eliza, and in his will made part of the said cases, after sundry devises and bequests for the benefit of his widow and specific bequests of furniture and bank

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stock to his said daughters Susannah and Ann Eliza, both then single, the latter afterwards married to Henry Lockwood, M. D., proceeded as follows:

“Fifth, I give, devise and bequeath unto the said Enoch Green and John Stewart and their heirs and the heirs of the survivor of them, all my real estate, lands, tenements and hereditaments, with the appurtenances, wheresoever situate, and all my personal estate or other property of whatever nature or kind, to have and to hold the same upon the trusts and to and for the several uses hereinafter and before expressed and declared concerning the same; that is to say,

After the payment by them of my debts, funeral expenses and the personal legacies above bequeathed, I hereby direct my said executors and the survivor of them, as soon as conveniently can be after my decease, to ascertain the value of the whole of my said real and personal estate, then to set apart such a portion of the same as may be necessary to constitute a fund from the annual proceeds of which together with the rent of the said store, the annuity bequeathed aforesaid to my said wife, may be paid, then to ascertain how much has been advanced by me to each and every of my children and the husbands of those of my daughters who are or have been married, and how much each of them may be indebted to me on bond, note, book-account or otherwise, and to so divide the residue of my said property among my said children, to be paid to them or held to and for their use as hereinafter directed, as that each child may have an equal share of my estate; that is, that the monies so advanced to any of my said children or the husbands of such of my daughters as are, have been, or shall be married, and for which they shall be indebted to me as aforesaid, be counted as so much paid on account of the share of such child in my estate, (the legacies of stock above bequeathed to two of my daughters to be also reckoned as part of their shares), and upon the decease of my said wife to make like distribution among my said children, to be paid and held as aforesaid, of the proceeds arising from the sale of the said house and furniture bequeathed to my said wife for her life as aforesaid, and the fund so as aforesaid set apart for producing the said annuity of \$600, (the like deduction as aforesaid to be made from the share of each child who may be still in advance of the others) so that my whole estate may be so divided that each of my children either during my life or after my decease may have received from me an equal portion with the others.”

He then gave authority to his executors to sell real estate, and proceeded to direct how the shares to his said children should be paid and invested; and in relation to the share of his said daughter Ann Eliza, he directed as follows: “And it is my will and I do further hereby direct the said trustees and the survivors and survivor of them, to pay over the shares in my estate coming to my daugh-

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ter Ann Eliza by reason of the said division to my trusty friend Enoch Green aforesaid; in trust, that he will immediately invest and put out at interest, on good real security, the monies so paid over to him by reason of this bequest, and hold the same, with all other property that shall come to his hands as part of my said daughter Ann Eliza's share to and for the following use, viz. to pay the interest and income thereof and therefrom annually, at such times and places and in such proportion as he shall judge expedient, to my said daughter Ann Eliza during her life; and if my said daughter shall marry, and not thereafter during my life have been so advanced by me, it is my will, and I do hereby order and direct her said trustee to pay over to her immediately out of the said fund, the sum of \$1000, to be absolutely hers; and after her decease I do order and direct the said Enoch Green to pay over and distribute the whole of the said fund equally among her children," &c.

All four said cases were argued together by consent, and the court in each case gave judgment for defendants.

Error assigned :

The court erred in giving judgment for defendants; they should have given judgment for plaintiffs and charged interest on the said debts.

Maxwell and Hepburn, for the plaintiffs in error. The notes and the bond were debts, not advancements. *Levering v. Rittenhouse*, (4 Whart. 130); *Haverstock v. Sarbach*, (1 Watts & Serg. 390); *Kreider v. Boyer*, (10 Watts 54). The testator distinguishes between debts and advancements. At all events, if the will changed them into advancements, they remained debts up to the date of the will, and interest is chargeable to that time for the value of the advancement as estimated at the time it is made. *Oyster v. Oyster*, (1 Serg. & Rawle 422). But the will shows an intention on the testator's part to charge interest. It distinguishes throughout between the advancements he had made and the debts due him from his children. The receipt of interest on the note of George also shows this intention. The testator throughout evinces a design to produce equality among his children, which can only be done by making those who have been advanced pay interest.

Brooke and Brown, contra. Equality would demand the opposite construction, as the presumption is that those who received money in advance left their home and provided for themselves, but those who remained were a charge to the parent. All these debts, except the bond, were barred by the Statute of Limitations, and would have been lost if the testator had died intestate. It is only by regarding them as advancements that the bar of the statute is saved. As to the receipt of interest, it was only in one instance, and was afterwards abandoned. On the whole will, the

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intent is plain that they should be put on the footing of advancements, and the interest, therefore, is not released. *Hall v. Davis*, (3 *Pick.* 450), is a case as nearly resembling the present as can be, and there the interest was held not chargeable. They also cited *Smith v. Porter*, (1 *Binn.* 212); *Wentz v. Dehaven*, (1 *Serg. & Rawle* 317); *Jer. Eq.* 90; *Hoak v. Hoak*, (5 *Watts* 82); *Musselman's Estate*, (5 *Watts* 9); *Hengst's Estate*, (6 *Watts* 87); *Watson v. Watson*, (6 *Watts* 257); *King's Estate*, (6 *Whart.* 370); 2 *Dess.* 127.

The opinion of the Court was delivered by

GIBSON, C. J.—That the notes in question were originally evidence of debt, is not to be contested; for whatever may have been the ultimate purpose of the father, the monies advanced by him might have been recovered back, which shows they were not given absolutely in anticipation of the shares at his death. But whatever they were at first, he had power to turn them into advancements by his will; and he did so by directing his executors to ascertain how much had been advanced to each of his children, or how much each of them had been indebted to him, and to divide the residue of the property so that all should have equal shares, the monies advanced being considered as paid on account. It is evident that he used the word “indebted” as equivalent to the word “advanced;” and the question is whether the monies are to viewed as advancements from the date of the notes, or from the date of the will. The plaintiffs contend that interest ought to be charged respectively from the times when the notes, as such, would have begun to bear it; and that the principal sums cannot be treated, by relation, as advancements at periods further back. But the testator had power to order it otherwise; and when he said the debts should be treated as advancements, he made them such out and out, and gave them all the usual incidents, one of which is that they should be valued as of the time of the gift. Had he meant that they should be debts as regards interest, and gifts as regards the principal, he would have said so. It is pretty clear that he did not mean, from the first, that interest should be charged on any of the notes but one; for where an advancement is put into the form of a debt, the object is not accumulation, but to enable the father, as a creditor, to save something from the wreck of the child's property in case of misfortune; and the construction we have put on this will best accords with the actual intent.

Judgment affirmed.

Street *against* The Commonwealth.

Under the Acts of 15th April 1834 and 2d July 1839, in case of a contested election of an assessor or assistant assessor, the Quarter Sessions are to decide whether there is a vacancy; and if they find there is, the County Commissioners are to appoint a person to fill the office: that court has no power to order a new election.

An Act of Assembly will not be construed to repeal by implication an express enactment, unless there be a clear and strong inconsistency between them.

ERROR to the Common Pleas of *Philadelphia* county.

Commonwealth *ex relatione* Henry Shuster against Emanuel Street. This was a *quo warranto* issued on the suggestion of Shuster that he was elected assessor of the Fourth Ward, Spring Garden, against Street, to show by what authority the latter exercised that office. The defendant in his answer claimed the office on the ground that a vacancy existed on the 1st May 1843, upon which the county commissioners appointed him, and he was duly qualified. The Commonwealth demurred specially to that part of the answer alleging vacancy, because it did not state how it was occasioned. On this demurrer judgment was given for the Commonwealth. The defendant made further answer that the election holden at the regular time, viz., the third Friday of March 1843, was set aside by the Court of Quarter Sessions, and hence the vacancy; whereupon the commissioners of the county appointed him. The Commonwealth replied that after setting aside said election, the said court ordered a new election to be holden the third Friday of May 1843, at which last-named election the relator was chosen. On demurrer to this replication by the defendant, judgment of ouster was given against him.

Errors assigned:

1. The court erred in giving judgment for the Commonwealth upon the special demurrer.
2. In giving judgment of ouster against defendants.

H. M. Phillips and *Dallas*, for plaintiff in error. It will be urged that under the provisions of the 155th section of the Act of 2d July 1839 (*Purd.* 263, 6th ed.), which gives the Quarter Sessions, in case of a contested election of a township officer, all the powers conferred by that Act upon committees of the Legislature, that court has power, when it sets aside an election, to order a new one. But the Act gives the committees no such power. All they have to do is to declare the election of a member valid or invalid. By art. 1, sect. xx. of the constitution, the speaker is to issue his

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writ of election to fill vacancies in either house. Unless then the court construe an express provision to be repealed by implication, which they will not do, the power given to the county commissioners by the 87th section of the Act of 15th April 1834 (*Purd.* 992) to appoint an assessor in case of a vacancy, was properly exercised by them, and the Quarter Sessions had no power to order a new election. Moreover, the fiscal concerns of the county demand the speedy appointment of an assessor, and would manifestly suffer from the inevitable delay of successive elections.

Clarkson, contra, asked the court to affirm the judgment on the authority of *Barton v. Wells*, (5 *Whart.* 225), as but part of the record had been returned; but the court intimated that the point of the case was sufficiently raised by the record presented. He then contended that the 87th section of the Act of 1834 empowered the county commissioners to appoint an assessor only where a vacancy existed, and did not embrace the present case of an illegal and void election. There is no vacancy here; the existing assessor is to serve until another is elected or appointed. But if this were a case in which the county commissioners were authorized by that Act to appoint an assessor, that power is taken away by the 155th section of the Act of 1839, which gives the Quarter Sessions, in case of an undue election or false return, all the powers conferred by it in the 142d, 5th, 6th and 9th sections, upon committees of the Legislature, in case of an undue election of a member, viz., to declare such election invalid, and order a new one.

The opinion of the Court was delivered by

HUSTON, J.—This case is brought to this court to decide whether, in case of an omission to elect an assessor, or in case of a contested election which shall be declared void, the commissioners shall appoint an assessor, or there shall be another election for an assessor. On the 15th April 1834 a law was passed, intended to be a complete system as to assessment of county and township taxes, and as to the election or appointment of county and township officers. I shall consider how this matter would have stood under that law, and then what alterations, if any, have been made by subsequent laws. Sect. 81. The assessors and assistant assessors were to be elected at the time inspectors were chosen for the general election, in October of each year. The election of all other township officers was to be in March of each year. Within six weeks from the general election in October of each year, the commissioners were to issue their precept to the assessors of the respective townships, wards and districts, (this time as to the city of Philadelphia, by a subsequent Act of 31st March 1836, is limited to thirty days,) commanding them to make out within thirty days a just and perfect list of taxable property and taxable persons,

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After some very precise directions as to how this shall be done, it directs that the assessors and assistants shall value all the property assessed, and then the several assessors shall convene at the office of the commissioners of the proper county, on a day to be appointed by the commissioners, to consult and adjust their respective valuations and returns. The commissioners shall then adjust the sum to be levied and collected in each ward. The commissioners shall transmit to each township or ward accurate lists of such valuation, with the rate per cent. and the day of appeal. This is to be sent to each township, ward or district, on or before the second Monday of April. Then within ninety days of the middle of October, that is, by the middle of January, the assessors' first list is to be completed. The assistant assessor and assessor are to put a valuation, and on a day to be fixed by the commissioners, the assessors are to meet them to adjust the respective valuations. Say thirty days for this, and we are at the middle of February. At this time the commissioners are to proceed to assess the amount to be levied on each township, ward or district, and what proportion of that shall be laid on each farm, house, lot, mill, &c., and on each trade and office, and on each single freeman, and make a fair transcript of this for each township, &c., and transmit it, together with the time of the appeal, before the second Monday of April, leaving about six weeks in which to go through these last-mentioned matters; that is, if no days have been lost by neglect or sickness of any person.

It will be observed that until the valuation of every township, ward and district is before the commissioners, and thus they know the amount of the valuation of each, they cannot proceed to assess the amount to be levied in any one. The Legislature were aware of this, and in the 83d section it is provided that if the township shall fail to choose any township officer, other than assessor or assistant assessor, or if any person elected to such office shall neglect or refuse to serve, or if any vacancy shall happen by death or *otherwise*, the Court of Quarter Sessions may appoint a suitable person to fill such office until the next annual election. The 87th section says, if any township shall fail to choose an assessor or assistant assessor at the time appointed by law, or if any person elected to such office shall neglect or refuse to serve therein, or if any vacancy shall happen by death or *otherwise*, the commissioners of the county shall appoint a person to fill said office, who shall have all the powers, &c., as if he had been elected thereto. Under this last law, then, there was an express provision; and if we understand the words "fail to elect," to embrace a case of void election, and the words "vacancy by death or otherwise" to include vacancy from every possible cause, there can be no dispute as to the power of the commissioners: and we need not resort to the strong inference from the necessity of a speedy appointment. It will be observed, also, that as to township officers a second

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election was not to be held in any case; for as to all other township officers except assessors and their assistants, the Quarter Sessions were to appoint. But in this law there was no provision for trying a contested election; and a subsequent Act made for that purpose is alleged to control the provisions of this Act of 15th April 1834.

On the 2d July 1839, an Act was passed relating to the elections in this Commonwealth. The 153d section gives to the Court of Quarter Sessions power to hear and determine in all cases where the election of any county or township officer is contested. The 155th section gives to that court the power to compel the attendance of the officers of the election, and all other persons capable of giving information, and to compel the production of tally lists, &c.; and shall have all the powers conferred on the committees of the Legislature by the provisions of this Act. To ascertain these powers, we are referred to the 142d, 145th, 146th and 149th sections of the law; and we find the same powers in the same words as to sending for and compelling the attendance of witnesses and production of papers and documents. And first, as to the committee on the governor's election. If they find the election invalid, a new election is to be had on the second Tuesday of the next October, according to the directions of the constitution; of which not the committee, but the speakers of Senate and House of Representatives, are to give notice. As to members of either branch of the Legislature, if they find the election invalid, a new election is to be held in the manner hereinbefore provided to fill vacancies. That is, the speaker of the House is to issue his warrant for an election.

We find then no power in the committee to order an election. The vacancy from an invalid election is to be filled as any other vacancy; and that depends on other laws and the constitution. Is not then the power of the Quarter Sessions, in case of a contested election, to decide whether there is a vacancy; and if they find one, that vacancy is to be filled as expressly provided by former laws. That is, in every case except assessors and assistants, the Quarter Sessions is to appoint, and the commissioners to appoint the assessor and assistants. The inconvenience of there being no constable, supervisor of the highways, or overseer of the poor, was, I suppose, the reason why a power to appoint at once was given, and no second election. If we add to what was said before, that the road tax and poor tax could not be assessed until after the county tax was finally adjusted after the appeals, we will see strong reason for filling the office of assessor at once. To repeal an express enactment by implication, requires a strong and clear inconsistency between the laws. I see none such here. On a vacancy in the office of constable, supervisor or overseer of the poor, from any cause, the Quarter Sessions must appoint, and not

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order a new election; and in the case before us the commissioners had the right to appoint.

Judgment reversed, and judgment for defendant below.

Gilkyson *against* Larue.

The acknowledgment of a debt is evidence of a promise; but to avoid the statute of limitations it ought to be plain and express, and beyond all doubt. It is not sufficient if it is merely an inferential promise not to plead the statute made without consideration; nor where it is a disclaimer after suit brought and judgment recovered, of an intention to plead the statute, accompanied by an allegation that the judgment entered was for too much.

A Court of Common Pleas, when it opens a judgment on affidavit of the defendant, ought to prescribe terms so as to confine the party to the grounds of defence set forth in his affidavit.

ERROR to the Common Pleas of *Bucks* county, in which suit was brought to April term 1839 by Samuel Gilkyson (on whose death his executors were substituted) against Aaron Larue, and a verdict and judgment rendered for the defendant. The suit was on a promissory note dated April 18th 1829, made by the defendant in favour of James Gilkyson, promising to pay the sum of \$850 with interest at 5 per cent. until paid. The defendant pleaded *non assumpsit* and payment with leave, &c., and *non assumpsit infra sex annos*. Replication that he did assume within six years. The plaintiffs afterwards added the replication "that James Gilkyson, at the time when the said cause of action in the declaration mentioned was given, accrued, &c. to the said James, was *non compos mentis*, and was *non compos mentis* from the time said cause of action accrued until the institution of said suit, viz., on the 5th March 1839." On this replication the defendant took issue.

On the trial at November term 1843, the plaintiffs proved the execution of the note and offered it in evidence. The defendant objected, and the court said they would postpone the admission of the note until evidence was heard taking the case out of the statute. The plaintiffs then offered the testimony of Judge Hart, as stated below; but the defendant objected to it on the ground that no evidence could in the state of the pleading be given of any assumption or acknowledgment, and also that it did not appear the witness had any authority to call on the defendant, for the testator was then in full life, and that such declarations were not evidence to take the case out of the statute. The court said they would hear the evidence and overruled the objection, and sealed an exception.

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The witness then testified: "About the year 1836, in consequence of a question asked me by Elias Gilkysen, I had reference to my uncle's (James Gilkysen) will, which I had in keeping; when looking to that particular point so as to answer his question, a circumstance of Aaron Larue's note, with which I was partially acquainted, arose in my mind. I never had seen it. I suspected from the manner notes were usually drawn, it was a note without a seal. I was apprehensive from what I understood was the state of my uncle's mind, some difficulty might arise on the subject. In the course of a day or two I went to see Mr Gilkysen, to see what the state of his mind was. I went and sat with him two or three hours; found his mind totally gone. He did not know me, notwithstanding our former intimacy. I think Samuel Gilkysen, his son, with whom he resided, was not at home; but after I had satisfied myself nothing could be done with the old gentleman, when Samuel came home, I told him the circumstances of the case and what I had come for, and asked him to look at the note. (My intention was to state my fears to the old man, and get him to provide by codicil to the will to cure the difficulty. I had the will with me.) I ascertained there was no seal to the note. I then proposed to Samuel to go to Aaron Larue, who lived about a mile and a half off. We went, and as nearly as I can recollect, I stated all the circumstances I have now stated, to Larue, and my reason for coming. After I had done so, Larue hesitated before he made any answer. I told him my object was to see whether he would agree not to take any advantage of the Statute of Limitation. If he would not agree to it, I would return and stay with my uncle at least a week, if necessary, to see whether I could find him in a situation to make any alteration, if he thought proper to do so, in his will to cure the case. Larue stated distinctly that he had no wish to do anything that was wrong in the business; that he would not take advantage of the Statute of Limitation with respect to the note. I think this was in the fall of 1836. Aaron's wife was present, and said it was very hard they should pay all the interest. This was in Aaron's presence, and, my impression is, after what Aaron had said, but am not certain. Aaron made no answer to her observation. I was satisfied with what had passed, and went away and staid all night with Samuel Gilkysen, and returned home immediately the next morning. I never thought of it afterwards until the note was contested. I was satisfied he would not take advantage of the statute. I drew the will of James Gilkysen in 1826. I was consulted when he had any business to transact: had not a great deal to transact. When together, he consulted me in any business he had to do. He sent for me to draw his will in 1832. I do not know of any other person whom he advised or consulted with. I presume Larue knew I did business for my uncle: he had an opportunity of knowing, and I have no doubt of it."

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Cross-examined. "This was in 1836. The writing of the will in 1832 or 1833 was the last business I did for James Gilkyson. I called on Larue as the friend of the family, and with no other authority. I did not tell Larue I called as the agent of James Gilkyson. He was then incapable of appointing an agent. I then resided 18 miles from James Gilkyson. When I wrote the will, I resided five miles nearer. I thought him of sound mind in 1832. Samuel Gilkyson, Larue and Rachel, his wife, were present, and his daughter, part of the time. I had not the note, and as far as I know, it was not there. It was not exhibited to Larue. The date was not mentioned. I did not know the date. The amount was not mentioned. I do not know who drew the note. I don't know who did his business in 1829. The principal business I did was in relation to his will. It was in relation to his will he stated to me the circumstances of the note, and his transactions with his children several times. All the business I did was in consequence of writing his will."

Re-examined. "My knowledge about the note was from James Gilkyson when I drew the second will about 1831. I said before that it was in consequence of that knowledge I called on Larue. I knew of no other note held by the old gentleman against Larue. This note was the subject-matter of my conversation with Larue. I drew all his wills. I was his agent to draw his wills."

The plaintiffs then offered the testimony of E. T. M'Dowell, Esq. as stated below; but the defendant objected to it on the ground that it was to prove declarations subsequent to the suit, which could not support a promise sufficient to maintain the action. The court said they would hear the evidence, and consider it again when the note was again offered. The defendant excepted, and a bill was sealed.

The witness testified: "I brought the suit for the committee of James Gilkyson, who was John Yardley. We used the name of James Gilkyson. I believe it was brought to April term. On the return of the writ I entered judgment by default, Larue not appearing. Some time after that, between April term and the following term, Mr Ross and Mr Larue called on me and wished me to consent to open the judgment, alleging as a reason that there had been an arrangement or understanding between Mr Yardley and Larue, by which Larue understood it was not necessary for him to appear to the suit. I had no knowledge of the fact stated by Larue, for Mr Yardley refused to consent to open the judgment. I stated also to Larue, I believed or supposed he only wanted to plead the Statute of Limitation. He very expressly and frankly denied the charge, and stated that the judgment had been entered for too much; that he never was or ought not to pay interest. The matter of complaint was the interest, alleging at the same time all he wanted was to have it properly settled. We separated, and on application of Mr Ross the judgment was opened by the court.

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When I accused him of wanting to plead the statute, he said he did not; that the judgment was for too much. Said nothing against the principal, unless he intended it by saying the judgment was for too much. I do not recollect any other matter of complaint except the interest. We made no agreement."

James Gilkysen testified that he had a conversation with Larue about the 1st April 1839. Larue wanted to know whether it was necessary for him to appear at April court on the return of the writ. Witness told him it would be necessary for him to employ counsel, but not necessary for him to be there: counsel would prevent judgment going by default.

The note was then offered, but was objected to by the defendant, and the court rejected it, believing the weight of authority was against the plaintiff's right to recover, and saying they admitted all the plaintiff's evidence to enable this court to have the case in all its bearings before them, and so judge of the plaintiff's whole cause.

Errors assigned:

1. The court erred in rejecting the note.
2. They should have submitted the note and evidence of Judge Hart and E. T. M'Dowell, Esq. to the jury.
3. They should have submitted Judge Hart's testimony to the jury.

Chapman, for the plaintiffs in error, insisted that the court erred in precluding the plaintiff from reading the note to the jury after its execution had been proved. The question whether it was barred by the statute was a subsequent consideration, and was for the jury to decide under the direction of the court. Where the conduct and expressions of the defendant at the time of making the acknowledgment are equivocal or ambiguous, it is a question of fact for the jury whether they amount to such an admission of a debt as will raise the presumption of a new promise. *Church v. Peterow*, (2 P. R. 306).

But on the evidence there was sufficient proof of an acknowledgment. Two witnesses showed an admission of the principal sum, and in relation to the same note. The declaration to Hart that he would not take advantage of the statute of limitations, and to M'Dowell to the same effect, and that the judgment was for too much only so far as respected the interest, amount to a subsequent acknowledgment. *Berghaus v. Calhoun*, (6 Watts 220); *Allison v. James*, (9 Watts 380); *Magee v. Magee*, (10 Watts 172); *Gleim v. Rise*, (6 Watts 44); *Gallagher v. Milligan*, (3 P. R. 179).

Ross, contra, contended that the late course of proceeding was the one followed by the court below. It is recognised as proper in *Magee v. Magee*, (10 Watts 172, 5), and *Fritz v. Thomas*, (1 Whart. 66). If the court ought to have instructed the jury that

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the evidence was not sufficient, they were bound to reject it. Now the acknowledgment was not established by Hart, for various reasons. He had no authority; and an acknowledgment, to affect the party, must be to the owner or his agent, known as such: conversations with neighbours and strangers must be disregarded. *Farmers' and Mechanics' Bank v. Wilson*, (10 Watts 262). The acknowledgment, moreover, must be in favour of one in existence to receive it; *Blansh. Lim.* 168; *Ward v. Hunter*, (6 Taunt. 210); whereas here James Gilkysen was mentally extinct. There is no certainty that this was the note referred to. Again, when Hart called, the six years had elapsed; it was not a subsisting debt; and there must in such case be an express promise to pay. But the defendant did not promise to pay, nor declare he had no defence whatever. He may have had some other, and lost the proof of it by the death of witnesses. A promise not to plead payment would not preclude him from pleading it: so neither does a promise not to plead the Statute of Limitations. Nor was there any consideration for such promise. M'Dowell's evidence was also properly rejected. It went to show an acknowledgment after suit brought. It amounts to nothing more than that the defendant denied part of the claim; and it results merely in this, that M'Dowell refused to open the judgment, and the parties stood as they were before.

To show that the evidence did not make out a sufficient acknowledgment, and it would have been wrong to submit such a case to the jury, he referred to 2 *Stark. Ev.* 482; *Church v. Feterow*, (2 P. R. 305); *Gallagher v. Milligan*, (3 P. R. 179); *Hogan v. Bear*, (5 Watts 111); *Gleim v. Rise*, (6 Watts 44); *Berghaus v. Calhoun*, (*Ibid.* 219); *Allison v. James*, (9 Watts 380); *Magee v. Magee*, (10 Watts 172); *Hay v. Kramer*, (2 Watts & Serg. 139).

PER CURIAM.—The loss of this debt is due to the court which opened the judgment, without prescribing as a condition of its interference that the defendant should not plead the Statute of Limitations. According to the testimony of Mr M'Dowell, the allegation on which the court proceeded was that the judgment ought not to have been for interest, and this accompanied by an express disclaimer of a design to plead the statute; yet the judgment was opened generally; the statute has been pleaded; and a fair debt has been lost by it. The Courts of Common Pleas seem to think they have no power to impose terms, or that it is not their business to exercise it; whereas it is clear that their power is discretionary, and they ought to prescribe the issue so as to draw into contest no more than the matters alleged for ground of defence in the affidavit. On the pleadings, however, the only question before us is whether there was evidence of a subsequent promise to go to the jury. The acknowledgment of a debt is evidence of a promise; but it ought to be plain, unambiguous,

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express, and so distinct and palpable in its extent and form as to preclude hesitation. But the acknowledgment here was only inferential, if indeed it could be inferred from an agreement without consideration not to plead the statute, which however was no disclaimer of all other grounds of defence. The defendant's disclaimer of an intention to plead the statute after the suit was brought, accompanied with an allegation that the judgment was for too much, would come too late for the purpose of the action, even if it were evidence of a subsequent promise; for it would fail to prove the existence of a cause of action at the suing out of the writ. We cannot say, therefore, that the court erred in excluding the evidence.

Judgment affirmed.

Zimmerman *against* Anders.

"Concerning my real estate, I do give, devise, demise and bequeth unto my wife all that lot of land whereon I now dwells, together with all the appurtenances, &c.; and all the residue and remainder of my real and persunal estate not bequeathed, whatsoever it may be, I give and bequeath to my wife; and after her decease and funeral expenses is paid of, it is my will what is left, whatever real or persunal or money, is to go to the S. society," &c. The testator's wife died before him. *Held*, that the wife took an estate for life in the lot in question with vested remainder to the society, which became entitled to an immediate estate in possession on the testator's decease.

A devise to an association for religious purposes unincorporated at the testator's death but since incorporated, is good in Pennsylvania.

The conservative provisions of the statute 43 Eliz., relating to charitable uses, are in force in Pennsylvania.

ERROR to the Common Pleas of *Montgomery* county.

This was an action of ejectment for a messuage and 14 acres of land in Lower Salford township, in which George Anders, Jun. and Casper Schultz, poor-officers of the Schwenkfelder Society were plaintiffs and David Zimmerman defendant. The following case was stated for the opinion of the court, with a right to either party to take a writ of error:

Edmund Flinn, late of Lower Salford township in the said county of Montgomery, became in his lifetime lawfully seised in his demesne as of fee, of and in a certain messuage and tract of land situate in the said township of Lower Salford in the county aforesaid, containing 14 acres or thereabouts, bounded by lands of Benjamin Reiff, David Heckler and Henry Kulp, and being so seised, died about the 23d day of December 1836, having first made his last will and testament in writing, bearing date the 20th day of

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May 1831, wherein and whereby he bequeathed and devised as follows, to wit: "First, It is my will that all my just debts and funeral expenses shall be paid *of* after my decease, out of my estate; and concerning my real estate, I do give, devise, demise and *bequeth* unto my beloved wife Maria *Flin*, all that lot of land whereon I now *dwells*, together with all the appurtenances thereunto belonging, situate in *Loer* Salford township aforesaid, containing *forteen* acres more or less of land; and all the residue and remainder of my real and *pursunal* estate, not bequeathed, whatsoever it may be, I give and bequeath to my beloved wife Maria Flinn; and after her decease and funeral expenses is paid *of*, it is my will what is left, whatever real or *pursunal* or money, is to go to the Schwenkfelder Society poor-officers hands to be for the poor of their society. And lastly, I do nominate and appoint Benjamin Anders to be executor of this my last will and testament, in trust for all the interests and purposes in this my will contained."

Maria Flinn died about the year 1832. It is admitted there is such a society as Schwenkfelders, of which said testator was a member, existing in said county, who are and have been for a long time past associated for religious purposes, and that said society was not incorporated at the time of the testator's death, nor at the time of bringing this suit, but are now. The plaintiffs named in this suit were and are the poor-officers of said society. Nathaniel P. Brown is next of kin and heir at law of said testator. If upon these facts the court shall be of opinion that the plaintiffs are entitled to take said land under said will, then judgment to be entered for the plaintiffs; if not, then judgment to be entered for the defendants.

The court below gave judgment for the plaintiffs, on the case stated, which was assigned for error.

Dimond and *Mulvany*, for the plaintiff in error, contended that Maria Flinn took a fee-simple under the will; 15 *Johns.* 19; 16 *Johns.* 537; 10 *Johns.* 19; 1 *Johns. Ch.* 220; 4 *Wash. C. C.* 645; 5 *Mass.* 501; *Busby v. Busby*, (1 *Dall.* 226); *French v. M'Ilhenny*, (2 *Binn.* 20); *Weishaupt v. Brehman*, (5 *Binn.* 118); *Morrison v. Semple*, (6 *Binn.* 94; and that the society, not having been incorporated at the testator's death, had no capacity to take. *M'Girr v. Aaron*, (1 *P. R.* 49); *Hobart* 33; 4 *Wheat.* 27.

Brooke, contra, argued that the wife took only an estate for life in the lot in question, and the remainder in fee vested in the society. That the devise to the society was good, he cited *Metho-dist Church v. Remington*, (1 *Watts* 218); 9 *Cranch* 328; 1 *Atk.* 437; 3 *Pet.* 119; *Witman v. Lex*, (17 *Serg. & Rawle* 92); *Case of Sarah Zane's Will*, (*Circ. Co. U. S.*, BALDWIN, J.).

The opinion of the Court was delivered by

SERGEANT, J. — The intent of the testator must govern, in the

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interpretation of wills, if there be nothing in that intent which conflicts with the regulations of law concerning the nature and enjoyment of estates. If there be a devise of land to one in fee with the power of absolute disposal superadded, and then a limitation over to another of what is left at his decease, it has been decided that such limitation over is void because it is repugnant to the estate in fee first granted, and to the absolute gift to the first taker, and that was the point in the cases cited from 15 *Johns*. 169: 16 *Johns*. 537. But here there are no expressions showing that the wife was to have the whole disposal of the lot; and though the word "estate" standing by itself carries a fee, yet it is not a word of art but of interpretation, and its meaning is affected by other clauses and dispositions in the will. If the testator had stopped at the devise to his wife of all the residue and remainder of his real and personal estate, no doubt, she would have had the fee by virtue of the words, "residue and remainder of his estate not bequeathed;" but when he proceeds to dispose of it after her decease by giving over to another what is left after paying her funeral expenses, the intention to give her an estate for life only is manifest, and the limitation over is not repugnant to the previous devise but explanatory of it. We think, therefore, that Maria Flinn took under the will an estate for life in this lot, with vested remainder to the plaintiffs, who by reason of the death of the wife before the testator became entitled to an immediate estate in possession on the testator's decease.

The next question is, whether the plaintiffs could take the lot in question by virtue of the devise, being then, and for a long time an unincorporated association for religious purposes, and now incorporated, existing in the county of Montgomery in this State. That such a devise is good, and that a religious society may take and hold a bequest or devise for charitable purposes, has been too solemnly and repeatedly adjudicated to be now called in question. No Judge of this State has in any case doubted it, and every decision has sanctioned it. And it must needs be so, whether we consider either the uniform understanding and usage of the province and State from its first settlement, or the repeated recognitions of these rights and privileges by distinct and peculiar clauses in our constitutions, or the well-known and long-settled principle of our courts, that equity forms part of the law of Pennsylvania, and that the doctrines of the English Court of Chancery will be enforced in our decisions so far as they are applicable to our situation and capable of being administered by the forms of our judicial tribunals, either in a common law proceeding, or in such branches of equity jurisdiction as are expressly given. And though the statute 43 Eliz. is not in force in Pennsylvania, it would seem it is so considered rather on account of the inapplicability of its regulations as to the modes of proceeding, than in reference to its conservative provisions; these, I conceive, have been in force here by

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common usage and constitutional recognition, and not only these, but the more extensive range of charitable uses which chancery supported before that statute and beyond it. Of such recognition of parts of a statute, though the statute itself be not in force, we are not without other examples. It is unnecessary, however, to enlarge on a point so often considered and fully and ably examined in the various decisions. We think the devise to the plaintiffs clearly good, and that by the settled law of this State they are capable of taking and holding the lots in question for the purpose expressed in the will.

Judgment affirmed.

Brown against Street.

In a suit by the holder against the maker of a negotiable note, the plaintiff cannot be called on to prove the consideration between himself and the payee, unless it be shown that the note was obtained or put into circulation by fraud or undue means.

ERROR to the District Court for the city and county of *Philadelphia*, in which an action on the case was brought by Thomas Street against John M. Brown & Benjamin Lowerre, trading under the firm of Brown, Lowerre & Co., on the following promissory note, a copy of which was filed:

\$667.

"Philadelphia, May 10, 1841.

Twelve months after date we promise to pay to the order of Samuel H. Aldridge, six hundred and sixty-seven dollars, without defalcation, for value received.

BROWN, LOWERRE & Co.

(Endorsed) S. H. ALDRIDGE,
THOS. STREET."

The following affidavit of defence was filed:

"John M. Brown, being duly sworn, says, that the defendants have a just and true defence to the whole of the plaintiff's demand in this case; that the note in question was given to S. H. Aldridge, a retiring partner of the defendants' firm, in anticipation of his share of the stock and debts of said copartnership, under the belief of defendants and the assurance of Aldridge, that the said debts and stock would realize more than the said amount, and upon no other consideration whatever: that said Aldridge had been in said partnership about two years, and had put in no capital but had drawn out about \$4000; that said stock and debts have since

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turned out so different that said Aldridge is now in debt to said copartnership the whole of said \$4000; that after the date of the said note, viz. in July 1841, the parties did agree that said Aldridge should be paid the said note, no matter how the accounts should result, but upon the express condition that said Aldridge should not, within four years from said time, enter into the same trade as defendants, which agreement the said Aldridge has broken, and he is now interested in and carrying on said trade; that the said plaintiff is a particular and intimate friend of said Aldridge, and deponent believes that Aldridge is the real plaintiff, who uses the name of Street to accomplish the recovery of the note in question. The consideration of said note has totally failed; and if said Aldridge succeeds, through the name of Street, in obtaining payment of the same from the defendants, the defendants will suffer great injustice."

The court entered judgment for want of a sufficient affidavit of defence, which was now assigned for error.

Hirst, for the plaintiffs in error, referred to *Stitt v. Garrett*, (3 *Whart.* 281).

St. George Campbell, contra, was not heard.

The opinion of the Court was delivered by

ROGERS, J.—The affidavit of defence amounts to nothing more than the defendant's belief that the payee is the real plaintiff, and that the name of Street is used for the purpose only of accomplishing the recovery of the note in suit. And the reason on which the belief is grounded is that the plaintiff is the particular and intimate friend of the payee. He avers that the consideration of the note has totally failed, and that if Aldridge succeeds in obtaining payment by using the name of Street, the defendants will suffer great injustice. The affidavit discloses a legal defence against the payee, and it would be equally good against the plaintiff, if there was collusion between the former and the holder of the note; but of this material fact there is no averment but an assertion of the defendant's belief that the transaction was colourable only; nor is there an averment from which we can fairly suspect any unfairness as to put the plaintiff on proof of the consideration passing between the payee and the plaintiff. The plaintiff is the holder of a note which is negotiable; and to put him on proof of consideration as between him and the payee, it must be shown that it was obtained or put into circulation by fraud or undue means. Some fact must be alleged from which we can reasonably infer that the note came into the hands of the holder by fraud or without consideration; but the allegation that the plaintiff was the intimate and particular friend of the payee, creates not even a shade of suspicion of any collusion whatever. *Knight v. Pugh*,

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(4 *Watts & Serg.* 445). Unless the affidavit sets out a legal defence, the plaintiff is entitled to judgment; and here every fact in the affidavit may be true to the letter, and yet the defendant may have no defence; for how will the defendants' belief avail them, unless they are able to support their allegation by proof?

Judgment affirmed.

Murphy's Appeal.

An assignment in trust for a preferred creditor, to pay and satisfy in full the sum of \$5178, to be paid to her or whoever may be entitled to receive it for her; held under the circumstances not to carry interest from the date of the assignment.

This was an appeal from the decree of the Court of Common Pleas of *Philadelphia* county, by John Murphy and Placette his wife, late Placette Caze.

Anthony Laussat, the elder, on the 8th June 1819, executed a general assignment to Honoré Fournier, in trust for certain preferred creditors, and afterwards for the benefit of his general creditors. The material provisions of the assignment were "for the uses following, to wit: after selling and disposing of the property and collecting the debts, from the proceeds thereof,

1. Upon trust, in the first place, to retain and reimburse himself the costs and expenses which he, the said H. Fournier, shall incur therein.

2. To pay and satisfy in full the sum of \$5178.32 to Placette Caze, a minor, to be paid to her or whosoever may be legally entitled to receive it for her.

3. To pay and satisfy in full the sum of \$800 to the widow Caze.

4. To pay and satisfy in full the sum of \$150 to Henry Labruere.

5. To pay and satisfy in full several bills and accounts hereafter to be specified by Anthony Laussat to Honoré Fournier, amounting altogether to the sum of \$600.

6. To pay and satisfy in full the sum of \$1600 to Sharpnack and Destouet in partnership.

7. To pay and satisfy in full the sum of \$5500 to Andrew Currier, on condition, however, that before he receives the said payment or any part thereof, he shall pay and deliver to Anthony Laussat all the promissory notes now outstanding in his favour on which Anthony Laussat is endorser, or for which he is responsi-

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ble; including particularly one dated the 17th of October 1818, at sixty days, for \$2050, in favour of the widow Caze.

8. After making the said preferred payments, that to Andrew Curcier to depend, however, on the terms aforesaid, then to pay all the creditors of Anthony Laussat resident within the United States of America, who shall have released their claims within thirty days from the date hereof, and all his creditors without the United States of America who shall have released their claims within twelve months from the date hereof, the amount of their several debts, in case there be enough hereby assigned for that purpose; but, if not, then to pay the said releasing creditors in average and *pro rata* proportions; the distributions among the said unpreferred creditors to be equal, *pari passu*, without any priority among them.

9. If any surplus shall remain of the said proceeds after all the said payments, to pay the same to the said Anthony Laussat, his executors," &c.

The fund which came to the hands of the present assignee, who succeeded to the trust by appointment of the Court of Common Pleas, was \$23,454.92, received between 1836 and 1838, from the commissioners under the French treaty, as indemnity for confiscated merchandise belonging to Mr Laussat. The sum so received was adequate to the payment of all the preferred creditors without interest, and if the claims of Honoré Fournier and Adrian Lestapies, to meet which \$10,000 of the fund had been directed to be retained by the auditor, should not be established, a considerable portion of the interest claimed by the preferred creditors.

The claim for interest, on behalf of the appellants, was made at the hearing, and rejected by the auditor; and his report being excepted to on account of such rejection, the court below confirmed the report.

It appeared by the report of the auditor, that the amount for which Placette Caze was preferred was due to her by Anthony Laussat for her marriage portion, which had been entrusted to him, and that she had other claims against him.

A release as creditors of Anthony Laussat, in consideration of the terms of the assignment of all and all manner of actions, suits, claims, demands, &c., appeared among the documents on the appeal, executed amongst others by And. Curcier, Placette Caze, H. Labruere, and Sharpnack, Destouet & Co., but it was without date.

Ingraham, for the appellant, contended that under the terms of the assignment, interest from the date of the assignment should be allowed Placette Caze on the sum for which she was preferred. The debt being then due bore interest, and she was to be paid and satisfied in full, which means principal and interest. The word "sum" meant only the assignor's estimate of what was due to her. He knew it could not be paid then, as the property was first to be

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sold and disposed of, and the proceeds collected: and in the fifth preference, a future period is expressly referred to. These preferences were for complete indemnity, as appears by the seventh preference, under which, if the restricted construction adopted by the court below takes place, Curcier might have to pay more than was returned to him. Equity never deprives a preferred creditor of his legal right to give it to another. He referred to *Fox v. Wilcocks*, (1 Binn. 194); *Say's Exrs. v. Barnes*, (4 Serg. & Rawle 116); *Browne v. Weir*, (5 Ib. 401); *Scott v. Morris*, (9 Ib. 123); *matter of Murray*, (6 Paige 204); *Martin v. Martin*, (6 Watts 67); *Huston's Appeal*, (9 Ib. 473).

Clay and Read, contra. The effect of the construction contended for is to give Placette Caze upwards of \$13,000 out of the funds, instead of the sum of \$5178.32, for which she is preferred. But the words of the preference will not under any construction carry interest. In *Scott v. Morris*, the word "demands" was used, which is a word of the largest import, embracing everything, actions, entries, accounts, rights, claims, and causes of action. So in *Brown & Agnew's Estate*, words of similar import were used. But here the assignor expresses the exact sum to be paid, notwithstanding he well knew the payment was to be postponed. The natural construction is, that preferences to about \$14,000 were to be allowed, and the residue to be distributed amongst the releasing creditors, who might claim their interest under the eighth clause, as well as any other debt due them. Why else did they release? Preferences to creditors have always been construed strictly, and are never extended by equity to the postponement of other honest creditors. Equality is equity. Besides, the fund was a mere *spes recuperandi*, and there is no interest on a dead fund as where money is stopped by attachment or injunction. If on the French claim interest was added, yet the amount recovered was a fixed sum; and what portion was principal and what interest, cannot be ascertained. They cited *Altham's Case*, (8 Co. 299); *Fake v. Eddy's Exec'r.* (15 Wend. 76); *Stevens v. Barringer*, (13 Ib. 639); *Himely v. Rose*, (5 Cranch 313); *Martin v. Martin*, (6 Watts 67); *Osborn v. U. S. Bank*, (9 Wheat. 738); *Hoare v. Allen*, (2 Dall. 102); *Fitzgerald v. Caldwell*, (Ib. 215).

The opinion of the Court was delivered by

SERGEANT, J.—In the ordinary cases of bankrupt and insolvent estates, a chancellor, exercising his jurisdiction over the assets under provisions made by law, acts upon principles of equity, and may apply them to the distribution of the funds among creditors. He may in a proper case adopt the principle of equality, which is considered as equity in the highest degree; and may take from one class and appropriate to others, so as to effect this object, where he is not opposed by the strict and express provisions of the

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Legislature. But in construing a voluntary assignment, I think, a different rule prevails, and that we are to regard the meaning of the assignor as exhibited by the language of the instrument of assignment. The assignor possesses the power to prefer such creditors as he pleases, and to such extent as he thinks fit to prescribe; and he who seeks to establish a preference for himself, must bring his claim within the terms used; there is no equity that can enlarge his right beyond that. Had the assignor in the case before us used any word that could be considered as including interest as well as principal, such as claim, demand, or other equivalent term, then, as interest when by law payable follows the principal and composes a portion of the claim, there would be good reason for including it in the preference. As in *Scott v. Morris*, (9 Serg. & Rawle 124), where the trust in the deed of assignment was to pay to the creditors of the first class "the amount of their respective demands in full." "The word 'demand,'" says C. J. TILGHMAN, "is very comprehensive; it includes everything which the creditor would have been entitled to recover by suit; and there is no doubt but interest might have been recovered as well as principal."

The rule laid down there, and on which that case was decided, is, we think, the correct one in the case of voluntary assignments; namely, that it must depend on the words of the trust contained in the deed of assignment. Now here no words are used in any of these preferences which will admit of a latitude of construction so as to embrace interest. That of Placette Caze, for instance, (and in this respect they are all alike) is "to pay and satisfy in full the sum of \$5178.32 to Placette Caze, a minor, to be paid to her or whosoever may be legally entitled to receive it for her." The payment is confined to that particular sum for reasons unknown to us, but which we are to presume were sufficiently weighty in the mind of the assignor; but there is no recognition of her debt or claim as such. It might well be that a debtor owing large sums to certain persons, and estimating a certain amount of assets, should prefer each of them for a portion of their debts, allowing them for the residue of their debt to take their chance amongst the mass of his creditors by coming in and releasing their claims; and such provision exists here for all other claims or debts beyond the sums mentioned, embracing, I conceive, as well any interest coming to these preferred creditors, as any surplus beyond the sums mentioned, as well as the debts of other creditors not preferred, by virtue of the eighth clause of the assignment. And this is the more probable in the present case, because the recent assets have come from a source probably little calculated on by the assignor as likely to be ever realized; and therefore not looked at in his arrangement of preferences, or, if contemplated at all, left open to time and chance. No argument, in construing this assignment, can, we think, be drawn from the

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character of the fund ultimately realized, even supposing we could ascertain what was principal and what interest in the money recovered under the treaty; since the question must depend on the words of the assignment, and the claimant must bring himself within them to establish his preference, whether the fund that yielded the assets ran on interest or not. For these reasons, we think the decree of the court below must be affirmed.

Decree affirmed.

Patterson *against* Poindexter.Boker *against* Hazard.

4 Cas. 4

An instrument in writing issued by a bank, signed by the assistant cashier, "I hereby certify that C. T. has deposited in this bank payable twelve months from 1st May 1839 with five per cent. interest till due, per ann. \$3691.63, for the use of R. P. & Co. and payable only to their order upon the return of this certificate," is not a promissory note within the statute of Anne, but a certificate of deposit on special terms.

Such instrument is negotiable for the purposes of transfer only, but not to make R. P. & Co. liable on their endorsement to the holder. It is a special agreement to pay the deposit to any one who should present the certificate and the depositor's order.

THESE were writs of error to the District Court for the city and county of *Philadelphia*. The first was an action brought by John J. Poindexter against Robert Patterson & William C. Patterson, trading as R. Patterson & Co., on the following instrument, a copy of which was filed:

Mississippi Union Bank, Jackson, Miss., July 2, 1839.

No. 716.

I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from 1st May 1839, with five per cent. interest till due, per annum, three thousand six hundred and ninety-one dollars and sixty-three cents, for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate.

(Signed) C. W. CLIFTON, *Ass't Cashier*.

(Written across the face) Regular number seven hundred and sixteen. W. H. Wilkinson, Teller.

Thirty-six hundred and ninety-one dollars and sixty-three cents. (Endorsed) Presented 1st May 1840. William P. Wynn, Teller.

Pay Edward Yorke, Esq., or order. R. Patterson & Co. Without recourse to me. E. Yorke.

[Patterson v. Poindexter — Boker v. Hazard.]

The following affidavit of defence was filed :

“William C. Patterson, one of the above-named defendants, being duly sworn, says, that the defendants have a just and legal defence to the whole of the plaintiff's demand in the above case; that the nature and character of the defence are as follows, viz : that the signature of the defendants to the instrument of writing of which a copy is filed in the above case, creates no liability on the part of the defendants in any manner whatever by any law or statute governing the rights of the parties.”

The court below entered judgment for want of a sufficient affidavit of defence.

Errors assigned :

1. The affidavit of defence filed in the court below states a sufficient defence; and judgment ought not to have been given for want of a sufficient affidavit of defence.

2. The copy of the instrument filed establishes no contract by the defendants below, or other liability on their part, nor any cause of action whatsoever.

3. The instrument, a copy of which is filed, is not a negotiable instrument; and the defendants, by endorsing it, incurred no liability.

4. The writing of the name of the defendants below on the back of the instrument (a copy of which is filed) is in the nature of an assignment, and not in the nature of an endorsement of a negotiable instrument.

5. The defendants below never wrote or authorized to be written the words, “Pay Edward Yorke, Esq. or order,” which appear written over their name, and hence it does not appear that they intended to insert words making the instrument negotiable further than their own assignee.

6. The action is improperly brought in the name of John J. Poindexter.

7. The mode by which the transfer is made by a simple endorsement evinces an intention merely to transfer the credit. Had it been the contract of the parties that the defendants below should have been liable on the default of the bank, they would have drawn a check instead of endorsing the certificate.

The other was a suit brought by Rowland G. Hazard against Charles S. Boker, on the following instrument, a copy of which was filed :

Mississippi Union Bank, Jackson, Miss., July 2, 1839.

No. 726. \$1115.52.

I hereby certify that C. S. Tarply has deposited in this bank, payable twelve months from 1st May 1839, with five per cent. interest till due, eleven hundred and fifteen dollars and fifty-two cents, for the use of Charles S. Boker, and payable only to his order upon the return of this certificate.

C. W. CLIFTON, *Ass't Cashier.*

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(Endorsed) Pay to the order of T. T. & K. Leavel. Charles S. Boker, Philadelphia.

Pay R. G. Hazard, or order, without recourse to us. T. T. & K. Leavel.

Presented May 1, 1840. William P. Wynn.

The following affidavits of defence were filed :

"Charles S. Boker, the above-named defendant, being duly sworn according to law, doth depose and say, that he has a just defence to the whole of the plaintiff's claim in the above case, the nature and character of which is as follows, viz : That the instrument of writing, a copy of which is filed, and upon which the plaintiff's action is brought, is not a negotiable instrument in the legal sense of that term, and therefore, as he is advised, he is not liable to pay the same by virtue of his endorsement thereon. And this deponent further saith, that he endorsed the same without any design or intention in any wise to guaranty the contract of the Mississippi Union Bank, or to engage in any event to pay the money mentioned in the said instrument. That the said instrument is known as and called by all men of business a certificate of deposit, and not as a promissory note ; that it is called a certificate of deposit in the protest thereof. That it passes solely upon the credit of the bank which makes the same, and this deponent considers the present attempt to make him liable for the same, to be a novelty and an experiment. Deponent does not believe that the present holder of the same, took the same upon the credit of this deponent's name. And this deponent further says, that this suit was brought in the name of Rowland G. Hazard ; and this deponent says, that at the time said certificate was protested for non-payment it was held by one J. J. Poindexter, to whom it had been endorsed in the following words ; "Pay to J. J. Poindexter, (signed) R. G. Hazard," by means whereof the legal title and right of action on said certificate, if it be a negotiable instrument, was vested in said J. J. Poindexter ; nor does it appear by the copy filed, that it has ever been reconveyed to said R. G. Hazard, nor has this deponent any knowledge that it has been so reconveyed."

"Charles S. Boker, for a further affidavit in the above case, states, that he merely wrote his name on the back of the instrument of writing, a copy of which is filed in the above case, and that the words, "Pay to the order of T. T. & K. Leavel," have been since added, without the authority of this deponent."

Judgment was entered for want of a sufficient affidavit of defence."

Errors assigned :

1. The affidavit of defendant filed, and the supplement thereto, state a sufficient defence, and judgment ought not to have been given for the want of a sufficient affidavit of defence.

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2. The copy of the instrument filed establishes no contract by Charles S. Boker, or other liability on his part, nor any cause of action whatsoever.

3. The instrument, a copy of which is filed, is not a negotiable instrument, and Charles S. Boker, by endorsing the same, incurred no liability.

4. The writing of the name of Charles S. Boker on the back of the instrument (a copy of which is filed) is in the nature of an assignment and not in the nature of an endorsement of a negotiable instrument.

5. The plaintiff in error, as it appears by the affidavit of defence, never wrote or authorized the writing of the words, "Pay to the order of T. T. & K. Leavel," which appear written over his name, and hence it does not appear that he intended to insert words making the instrument negotiable further than his own assignee.

6. The action is improperly brought in the name of William P. Hazard.

7. The mode in which the transfer is made by a simple endorsement, evinces an intention merely to transfer the credit. Had it been the contract of the parties that the plaintiff in error should have been liable on the default of the bank, he would have drawn a check instead of endorsing the certificate.

8. The affidavit of defence states that Charles S. Boker did not intend to incur any responsibility by the endorsement, and also his belief that the other parties did not receive the paper with any belief of his responsibility, or at all in consideration thereof. This concurrence of views constitutes the contract of the parties, and therefore no judgment should have been given.

These cases were argued at December term 1842, by *Gerhard* and *Randall*, for the plaintiffs in error; and *Bayard*, for the defendants in error: and were re-argued, at the present term, before the whole court, by *F. W. Hubbell* and *Randall*, for the plaintiffs in error, and *Bayard* and *Rawle*, contra.

For the *plaintiffs in error*, it was insisted that the instruments, copies of which were filed, were not promissory notes or bills of exchange or other negotiable instruments, the endorsement of which would render the endorsers liable, but merely certificates of deposit or acknowledgments of funds in the bank bearing interest, the assignment of which transferred the right to those funds to the holder on the contingency of his returning the certificates; and the following cases were cited. *Banbury v. Lisset*, (2 Str. 1211); *Dawkes v. Deloraine*, (2 W. Bl. 782); *Fisher v. Leslie*, (1 Esp. R. 426); *Israel v. Israel*, (1 Camp. 499); *Mullet v. Hutchison*, (14 E. C. L. R. 219); *Childers v. Boulnois*, (16 Ib. 411); *Payne v.*

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Jenkins, (19 *Ib.* 404); *Little v. Slackford*, (22 *Ib.* 280); *Horne v. Redfearn*, (33 *Ib.* 402); *Davies v. Wilkinson*, (37 *Ib.* 58); *Reeside v. Knox*, (2 *Whart.* 233); *M'Cormick v. Trotter*, (10 *Serg. & Rawle* 64); *Gray v. Donahoe*, (4 *Watts* 410); *Snevily v. Ekel*, (1 *Watts & Serg.* 203); *Hopkins v. R. Road Co.*, (3 *Ib.* 410); *Frevall v. Fitch*, (5 *Whart.* 325); 2 *Yerger* 50; 2 *M. & S.* 473; 7 *Meeson & Wels.* 410; 2 *Fairf.* 377; *Rhodes v. Lindly*, (*Ohio Cond. R.* 465); *Jones v. Fales*, (4 *Mass.* 245); 24 *Pick.* 423; *Fahnestock v. Schoyer*, (9 *Watts* 102); 2 *Pet.* 331; 4 *Wash. C. C.* 480; *Sharp v. Emmet*, (5 *Whart.* 288); 1 *Hill* 583; 2 *Miles* 442; 2 *Rose's Cas. Bank.* 225; 2 *Mood. & Rob.* 267; 2 *B. & P.* 413; *Stevens v. Hill*, (5 *Esp.* 247); *Chitty on Bills* 63, 64, 135, 136; *Lockhart v. Bank U. S.*, (2 *Watts & Serg.* 443); *Comly v. Bryan*, (5 *Whart.* 265); *Rising v. Patterson*, (5 *Ib.* 316); *Sleeper v. Dougherty*, (2 *Whart.* 177); *Weakly v. Bell*, (9 *Watts* 278); *Gorgerat v. M'Carty*, (2 *Dall.* 146); 4 *Hill* 444; *Craig v. Brown*, (1 *Pet. C. C.* 171); *Stephens v. Cowan*, (6 *Watts* 512).

For the defendants in error, it was argued that the instruments in question were negotiable instruments, whether called notes or bills of exchange or checks, being an absolute promise to pay money at a certain time, and acknowledging the receipt of a valuable consideration; and the following cases were cited: *Dewey v. Dupuy*, (2 *Watts & Serg.* 555); *Bank U. States v. Thayer*, (*Ib.* 447); *Morris v. Foreman*, (1 *Dall.* 193); 3 *Wash. C. C.* 404; *Gorgerat v. M'Carty*, (2 *Dall.* 144); 3 *Wheat.* 173; 12 *Louis.* 619; 6 *Cow.* 449; *West v. Simmons*, (2 *Whart.* 261); *Stat. 3 and 4 Anne*, ch. 9, sec. 1; *Leidy v. Tammany*, (9 *Watts* 356); *Chitt. Bills* 557-560, chap. 12, sec. 4; *Ib.* (1842) 126; *Bayl. Bills* 3-6; *Byles Bills* 34, 5, 6, 50; 3 *Kent* 74-77; *Cashborne v. Dutton*, (1 *Selw. N. P.* 381, 9th ed.); *Chadwick v. Allen*, (2 *Stra.* 706); *Morris v. Lea*, (*Ld. Raym.* 1396); *Kimball v. Huntington*, (10 *Wend.* 675); *Russell v. Whipple*, (2 *Cow.* 536); 14 *Johns.* 238; *Goshen Turnpike v. Hurin*, (9 *Ib.* 217); *Pepoon v. Stagg*, (1 *Nott & M'C.* 102); *M'Clarín v. Nesbit*, (2 *Ib.* 519); *Green v. Davies*, (10 *E. C. L.* 319); 7 *Ib.* 258; 2 *Mee & W.* 74; 7 *Ib.* 410; *Ellis v. Ellis*, (*Gow* 216); *Hansard v. Robinson*, (14 *E. C. L.* 20); 1 *Hill* 295; 2 *Hill* 295; *Ib.* 59, 62; *Chitt. Bills* (1836) 218, 219; 3 *Kent* 75; 6 *Wend.* 445; *Blymire v. Boistle*, (6 *Watts* 182).

The opinion of the Court was delivered by

GIBSON, C. J.—The application of a few plain principles will determine the character of the paper before us. In the first place, nothing is a promissory note in which the promise to pay is merely inferential; or, as Mr Justice BOSANQUET expressed it in *Horne v. Redfearn*, (6 *Scott* 267), in which there is “no more than a simple acknowledgment of the debt, with such a promise to pay as the

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law will imply." What more have we in the paper before us? "I hereby certify that C. S. Tarply has deposited in this bank, payable 12 mo's from 1st May 1839, with five per cent. int. till due, per ann., 3691 $\frac{63}{100}$ dollars," is the language, not of a promissory note within the statute of Anne, but of a certificate of deposit on special terms. The argument for the endorsee is that the word "payable," which is repeated, constitutes an express promise to pay. If that were its office, its repetition would have been unnecessary. But the words "yielding and paying," which are certainly more pointed, because they serve to indicate the fact of payment, and not, as here, the existence of circumstances connected with it, have been held to create no more than an implied covenant in a lease; and though there are conflicting decisions on the point, the weight of authority inclines to the side of implication. Serjeant WILLIAMS treats the law as if it were so settled in *Thursby v. Plant*, (1 *Saund.* 231, note 5). Independent of that, we must look at the word to discover the sense in which it was used by the parties, not to ascertain how far it will bear to be strained by construction; and it is obvious that being used in the first instance in connexion with words of time, its office was not even to acknowledge a debt, for that was done more directly by the certificate of deposit; but to specify the day when the depositors should have their money again, with interest for the use of it in the mean time. Nor do the superadded words, "for the use of R. Patterson & Co., and payable only to their order upon the return of this certificate," make the case a jot the stronger. The agent of the Messieurs Patterson deposited their money under a stipulation that it should be returned to their special order, on presenting the certificate, with interest at a day certain. The word "payable" was introduced a second time, evidently not to create an express undertaking, but to add a condition to the undertaking which was implied by the law. It was to restrain the generality of the implied obligation, and not the more explicitly to enunciate it. What more was it designed to express, than would have been expressed by the word "returnable"? Yet that word would no more create an express promise than would the word "accountable," which was not allowed to have that effect in *Horne v. Redfearn*. The word "payable" naturally expresses no more than that the thing of which it is predicated is the subject of payment; and where the parties have used it in its natural sense, by what authority shall we, who profess to be guided by the intention as the polar star of interpretation, say that they have used it in a different one?

But though the word were taken for an express promise, it would not sustain the action, unless it were taken also for an absolute and unconditional one; and a promise to pay on the return of the certificate would have been contingent. True it is that such a contingency is no more than is implied in every promissory

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note; for ordinarily there can be no recovery at law where the paper is lost or mislaid, though there may be a recovery in equity, indemnity being given; but it is, to say the least, doubtful whether a chancellor could relieve against the express terms of a contract imposing nothing like a penalty. Be that as it may, it is enough for the defence that the bank did not consent to pay on the bare order of the depositors, however signified; but on the foot of the certificate itself. Had it been contemplated that the ownership of the deposit should be transferable only by endorsement of the certificate, like that of a promissory note, such a condition would have been useless; for the endorsement would have been inseparable from the certificate, and could not have been presented without it; but not so a check to which the provision was intended to apply. It was doubtless understood that the ownership of the deposit might pass indifferently by check or endorsement; and it was doubtless to provide against inconsistent transfers and consequent embarrassment of the bank as a stakeholder between antagonist claimants, that a condition was introduced, which was as foreign to the terms of a promissory note, as would be a condition to pay out of a particular fund.

Again: The agreement for interest is a special one. The money was deposited on the 2d July 1839, "payable 12 mo's from 1st May 1839, with 5 pr. ct. int. till due;" and if the parties intended to reserve interest only from the date, why did they not say so, and name the ensuing 1st of May as the day of payment? They seem to have agreed that interest should be calculated from a day past, because for no other purpose than to express such an agreement was it necessary to recur to a day past. Had it been intended to designate the ensuing 1st of May as the day of payment, and to reserve interest from the date, it would have been much more easy to say so in terms than by circumlocution. A promissory note, though constituted by no precise form of words, is a plain, unambiguous and unconditional promise to pay, and is so described in all the transatlantic authorities.

It is argued that those authorities have been warped by the statutes which impose stamp-duties on notes, which, by reason of their penal tendency, are to be construed benignly. In only one of them, however, is there a definition of the instrument; the others left it to be dealt with as it stood under the statute of Anne. By the 5 G. 3, c. 184, "all receipts for money deposited in any bank, or in the hands of any banker or bankers, which shall contain any agreement or memorandum importing that interest shall be paid for the money so deposited," shall be deemed to be promissory notes within the purview of the statute; and it is because we have no such statute here that we hold this certificate not to be negotiable. It will be perceived that the legislation on the subject widened rather than narrowed the frame of the instrument, as it

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was originally constituted; and that it was the duty of the judges to follow out, rather than evade the policy of the Legislature, for the suppression of those frauds which we are told by Chief Justice TINDAL in *Horne v. Redfearn*, had been practised on the revenue. They must consequently be supposed to have held everything to be a promissory note, which could by any reasonable construction be brought within the range of the statutes. Mr Dwarrris (*Treatise on Statutes* 736) says that penal statutes are taken literally only in the point of defining and setting down the fact and the punishment; and for the position that the court is not to narrow the construction of them, he quotes the words of Mr Justice BULLER in *Rex v. Hodnett*, (1 T. R. 96): "We are to look to the words in the first instance, and where they are plain we are to decide on them. If they are doubtful, we are to have recourse to the subject-matter." As the letter of no statute was in the way of a liberal construction, the judges were doubtless disposed to adopt it so far as the words of the statute of Anne would bear. But before the 22 G. 3, c. 33, no stamp-duties were imposed on bills or notes; and the series of decisions which established that a promissory note must be for a sum of money payable absolutely, and not contingently either as to amount, person, event or fund, began even in the reign of William the Third. It was not the penal consequences of the Stamp Acts, there, but the convenience of commerce, which compressed bills and notes into the fewest words, importing a general undertaking, unclogged with conditions.

It is argued, however, that whatever be the character of the certificate, the endorsement of it is effectively a bank-check, which has most of the properties of an inland bill. But not to insist on the rule that a check be payable to bearer on demand, it is essential that it be not merely an endorsement to order, but a request addressed to the bank to pay, on presentment, a specified sum of money; and in these particulars an endorsement is deficient. The sum requested to be paid could be ascertained only by reference to the sum specified in the body of the writing, and by making the certificate a part of the supposed check: thus turning it from a certificate of deposit into, not indeed a promissory note, but what it less resembles, an inland bill of exchange. None but a commercial instrument is a subject of reference for the terms of an endorsement. True it is that the endorser of a note without negotiable words is responsible on the contract by reason that the endorsement is a new drawing. But such a note is nevertheless within the statute of Anne, and may be declared on as such. That the endorsement of a specialty is followed by no commercial responsibility, was determined in *Frevall v. Fitch*, (5 Whart. 325), which is decisive of this part of the case. The contract of endorsement is not an independent one, but a parasite which, like the chameleon, takes the hue of the thing with which it is connected.

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Attached to commercial paper, it becomes a commercial contract operating as a contingent guaranty of payment, and a transfer of the title where the paper is negotiable: attached to any other chose in action, it becomes an equitable assignment of the beneficial interest without recourse to the assignor. Now, that the instrument before us is not a commercial one, is decisive of the cause. For purposes of transfer merely, it was payable to order; for purposes of commercial responsibility, it was not negotiable. It was a special agreement to pay the deposit to any one who should present the certificate and the depositor's order. Why was it held in *Little v. Slackford*, (1 *Mood. & Malk.* 171), that the words "Mr L., Please to let the bearer have £7, and place it to my account," did not constitute a bill of exchange? Lord **TENTERDEN** said it was because the request did not purport to be a demand by one having a right to order. A better reason seems to be that the tone of the request did not indicate a willingness to incur the responsibility which ensues from the drawing of such a bill. The endorsement on this bill is still less indicative of it, and no more resembles a banker's check than would the endorsement of an entry of deposit in a bank-book. As the decision on this point is conclusive of the whole matter, it relieves us of the objection to the action on the ground of parties.

Judgment reversed, and a *procedendo* awarded.

Brown *against* Agnew.

One partner may maintain *assumpsit* against his copartner for contribution, where he pays a partnership debt more than six years after a general assignment by the firm in trust for creditors, and the defendant gives no evidence to show that the partnership accounts are open and unsettled.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in which William Agnew declared against William Brown in *assumpsit* for money paid, laid out and expended, and for money lent and advanced. The defendant pleaded *non assumpsit*, payment and set-off with leave, &c.

On the 1st February 1830, the plaintiff and defendant entered into partnership in the city of *Philadelphia* for the term of three years. On the 6th March 1832, the defendant made a promissory note in the name of the firm at six months for \$859.51, to the order of and endorsed by H. C. Corbit. On the 2d August 1832, the firm made a general assignment for the benefit of their creditors, and discontinued their business. Brown left *Philadelphia* in 1833,

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and had been permanently absent since 1837. S. & F. Dorr & Co. brought suit on the above note in the District Court against Brown & Agnew, late copartners, and recovered judgment, which was confirmed by this court on a writ of error to July term 1838. See 5 *Whart.* 131. On the 13th January 1840, Agnew paid this judgment under threat of execution, and brought the present suit to recover contribution for one-half of its amount, with interest, and also for one-half the amount of a debt of \$19.50 paid by him in 1839 or 1840, for merchandise purchased by the firm on the 14th April 1832. A witness for the defendant stated that during the partnership each of the partners received monies coming to the firm, as all partners do.

The judge charged the jury as follows: "The dissolution of the partnership renders it difficult to determine what is the proper form of action. If the defendant had paid the plaintiff's claim, or any part of it, he might prove it in this action. If he had any set-off against the plaintiff's claim, or any evidence to show he ought not to pay it, he might make such set-off and give such evidence in this form of action as well as in any other. This he declines to do, and relies upon his exceptions to the form of the action. I cannot say that the plaintiff is met here by a legal bar to his recovery, and leave the case to the jury, reserving, however, the point of law."

After argument, the court below confirmed the charge, stating that under it the jury might have found there was no satisfactory evidence in the cause that there were unsettled items between the parties, other than those which were the subject of the present suit.

Errors assigned:

1. The court erred in charging, in substance, that the plaintiff was entitled to recover in this form of action upon the evidence given by him, and that he was not met by a legal bar to his recovery in this form of action upon that evidence; and that the plaintiff's suit was rightly brought; and that he was not met by a legal bar to the form of the action; and that if the jury believed the evidence for plaintiff, he was entitled to recover; and that the court could not say that the plaintiff was met by an absolute legal bar to his recovery in this form of action.

2. In confirming the charge to the jury, and in assuming that they found a verdict upon a principle of law and an inference from the evidence, which was not submitted to them by the charge, and which inference could not be reasonably nor legally drawn from the evidence.

3. In misleading the jury, or in doing what was calculated to mislead them, by an ambiguous charge, and confirming the same, which charge was calculated to lead them to believe that the only question for them to determine was, whether the plaintiff had paid

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the partnership debts alleged by him, and that if he had so paid them, he was entitled to recover.

4. In charging, and in confirming the charge, upon the legal point of defence made by the defendant, in stating the law imperfectly and only in part, so as to favour the plaintiff and prejudice the defendant. If the view subsequently taken by the court below of the law was correct, it ought to have been submitted to the jury so that they could understand it; if in one view that might be taken of the evidence there was a legal bar to the plaintiff's action in its existing form as alleged by defendant, and in another view there was no such legal bar, then those two views ought to have been clearly stated to the jury, and they should have been told that if they believed that there were no unsettled items between the parties except those for which the plaintiff claimed, then the plaintiff was entitled to recover; otherwise not. To charge them simply that the court could not say that the plaintiff was met by a legal bar to the form of this action, when in one view which the jury had a right to take of the evidence he was met by such bar, was to state the law partially, vaguely and imperfectly on the point, giving so much only as would benefit the plaintiff, and withholding that which would benefit the defendant, and was therefore calculated to mislead them.

H. M. Phillips and *Earle*, for the plaintiff in error, contended that the proper action was account-render, and that *assumpsit* would not lie by one partner against his copartner for contribution towards the payment of a partnership debt, where it was an item in the partnership account. It lies where there is an insulated transaction not involving the partnership accounts, or for a balance struck; and to these cases it is confined. *Sadler v. Nixon*, (27 E. C. L. 247); *Helme v. Smith*, (20 Ib. 300); *Andrews v. Allen*, (9 Serg. & Rawle 241); *Ozeas v. Johnson*, (1 Binn. 191); *Foster v. Allanson*, (2 T. R. 479); *Lamalere v. Case*, (1 Wash. C. C. 435); *Killam v. Preston*, (4 Watts & Serg. 14); *M'Fadden v. Hunt*, (5 Ib. 468); 2 Bingham 170; 2 Gow 101; 3 Steph. N. P. 2393. These parties having transacted business as partners, the inference would be that they received money as partners: but, independently of that, we proved they did receive money as partners. They, therefore, had an account to settle, and on such settlement, perhaps, the plaintiff would be found a debtor. It lies on him, if he alleges, as the basis of his action of *assumpsit* that the accounts were settled, to prove it.

F. W. Hubbell, contra. The partnership commenced on the 1st February 1830, to continue for the term of three years. On the 2d August 1832 the firm made a general assignment, which was a dissolution. *Story on Part.* 145; 1 *Hoffman's Ch. R.* 517. The partnership was then at an end. There remained then only these

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insulated transactions. There is no proof of any other partnership item or claim, or of any partnership account to be settled. The action of *assumpsit* lies when there is only a single item. *Galbreath v. Moore*, (2 Watts 86); 1 Stark. R. 63; 6 Pick. 179; 5 Wend. 274. It is incumbent on the defendant to show that the account was open and unsettled. The court will not presume it, and we are not called on to prove a negative. Besides, if *assumpsit* does not lie, we are without remedy. Account-render would not lie; for, according to *Thouron v. Paul*, (6 Whart. 615), one partner cannot recover in account-render money paid to the other partner's use at law or in equity, but only money received by the defendant to the plaintiff's use: and the proof here is only of the defendant's having received money as partner to the use of the partnership, and not to the use of the plaintiff.

The opinion of the Court was delivered by

SERGEANT, J. — It would seem that where there is a general partnership, and one partner, during its existence, pays a partnership debt, he is not entitled to recover in *assumpsit* against the other for contribution; for this action is founded on contract, and there is no contract between them, of this kind, implied by the partnership, but the remedy is by action of account-render to compel a settlement of the accounts of the partnership and adjust the balance due on the one side or the other. If, however, the partnership has been dissolved, and the partnership accounts have been adjusted, and one partner is afterwards obliged to pay an outstanding claim not provided for, the action of *assumpsit* would seem to be the proper remedy to recover the proportion of it which the defendant ought to pay by reason of the joint liability. A contract on his part to do so would arise from the fact of payment, as money paid to his use for his proportion, and on ordinary principles the action would lie for contribution. The transaction would then come within the class which are termed insulated or cut off from the general partnership concerns, and would be the payment by a mere joint contractor on the common account. The authorities collected in *Collyer on Partnership* 156, 157, seem to sanction this principle. In the present case the payment was made in 1840. The partnership had been dissolved by a general assignment by the partners for the payment of their debts in August 1832, more than six years having elapsed from the dissolution till the payment of the claim and institution of this suit. These circumstances, we think, raise a fair presumption that the partnership accounts had been settled or terminated in some way, till it is overthrown by some evidence on the part of the defendant that the general partnership accounts yet continued open and current. This burden lies on him who seeks to avoid the plea of the Statute of Limitations to an action of account-render or *assumpsit*, by the replication that it was an account between mer-

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chant and merchant; for the replication to such plea must go further, and state that no account of said merchants was ever adjusted or settled. *Godfrey v. Saunders*, (3 Wils. 79, 80); 3 *Williams's Saund.* 127, note. By analogy, therefore, after the lapse of six years it lies on the party setting up an account to aver and prove that it remains open and current: and as the defendant here relies on the existence of unsettled accounts to defeat this action, the burden of making it out is thrown on him; and not having done so, there is no ground to defeat the action of *assumpsit*.

Judgment affirmed.

Pennock against Swayne.

Writ issued at the suit of C. S. and J. P., trading under the firm of S. & P., against G. P. & J. P., trading under the firm of G. & J. P., J. P. being a member of both firms, and was returned next day "Summoned personally on G. P." In the declaration filed the day the writ issued, the plaintiffs "complain of G. P., who has been summoned; &c.; for that, &c. the defendant and J. P. (who was joined as defendant in the writ in this suit, but who was not summoned, as appears by the record,) &c. were indebted, &c." G. P. pleaded and verdict for plaintiffs. On a writ of error taken by G. P. the proceedings were reversed as irregular and illegal, and such as could not be cured by verdict.

ERROR to the Common Pleas of *Chester* county, in which an action of *assumpsit* for goods sold and delivered was brought to February term 1841, by Caleb Swayne and Joel Pennock, lately trading under the firm of Swayne & Pennock, to the use of Benjamin Swayne, David Walton, John M'Gowen and Reuben Pusey, their assignees, against George W. Pennock and Joel Pennock, lately trading under the firm of G. W. & J. Pennock. On the 20th January 1841, the writ issued in conformity with the *præcipe* against George W. Pennock and Joel Pennock, lately trading under the firm of G. W. & J. Pennock, and the next day the sheriff returned "Summoned personally on George W. Pennock." On the day the writ issued, a declaration was filed, stating that the plaintiffs "complain of George W. Pennock, who has been summoned to answer the plaintiff in an action of trespass on the case; for that whereas the defendant and Joel Pennock (who was joined as defendant in the writ in this suit, but who was not summoned, as appears by the record,) lately trading under the firm of G. W. & J. Pennock, &c. were indebted to the plaintiff, &c." for goods sold and delivered. After a rule to plead, the defendant pleaded *non assumpsit* and payment with leave, &c., and in May 1842 a verdict was rendered for the plaintiffs for \$4757.77.

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The record contained notes of the evidence and bills of exception to evidence; but these were not certified by the court below, and therefore not noticed here. The following errors were assigned:

1. The *præcipe* and writ are against G. W. & Joel Pennock jointly as defendants; and the sheriff returns that he has summoned G. W. Pennock, without taking any notice of Joel, the other defendant, in his return.

2. The plaintiffs file their declaration against George W. Pennock alone, without stating in the declaration that the sheriff had returned that Joel, the other defendant, could not be found; or that the said Joel, the other defendant, was not or could not be found within the bailiwick of the sheriff.

3. The jury are sworn, and the verdict and judgment are entered generally, without saying whether against one or both of the defendants.

Meredith, for the plaintiff in error, contended that the proceedings were irregular and the judgment erroneous. There was no return as to Joel, which was indispensable to the plaintiffs' proceeding. In England the mode of proceeding in such case is first to prosecute the delinquent defendant to outlawry, before judgment can be had against the defendant appearing. Our practice does not require that; but it is essential there should first be some return by the sheriff as to all the defendants. Otherwise, it is in the power of the plaintiff to perpetrate great injustice, especially where, as here, the same person is one of the plaintiffs as well as one of the defendants; and he might take this course to screen himself and compel his partner defendant to pay his own debt. The declaration was filed on the day the writ issued, and states a return of not summoned, which is untrue. The Act of 14th April 1838, *Purd.* (1841) 841, authorizing a suit at law where a partner plaintiff is also a partner defendant, was never intended to countenance a proceeding of this kind. He cited *Taylor v. Henderson*, (17 *Serg. & Rawle* 456); *Latshaw v. Steinman*, (11 *Ib.* 357); *Boaz v. Heister*, (6 *Ib.* 18); *Stewart v. Abrams*, (7 *Watts* 448); *Sheets v. Rudebaugh*, (2 *Rawle* 150); *Craig v. Craig*, (3 *Ib.* 472); *Lee v. Parker*, (5 *Whart.* 342).

Darlington, contra, alleged there had been a reference and award and an appeal by George W. Pennock, and contended that after all these, and pleading and verdict on the merits, it was too late for him to come in by writ of error to take advantage of mere defect of form. He should have demurred or moved in arrest of judgment. The declaration does no more than anticipate the truth, viz., that Joel was not summoned; for that is substantially the return of the sheriff. The suit was not brought by Joel, but at the instance of his assignees, and this appears in the *præcipe*

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and writ. The plaintiffs could only proceed against the one who appealed. This court will not presume Joel directed the sheriff not to serve this writ on himself, or that the sheriff neglected his duty.

The opinion of the Court was delivered by

HUSTON, J.—The defendants here were plaintiffs below, and on the 20th January 1841 issued by their attorney a *præcipe* for a writ in case against George W. Pennock and Joel Pennock, trading under the firm of G. W. & J. Pennock. The writ issued according to the *præcipe*, commanding the sheriff to summon both defendants. The sheriff returned: January 21, 1841, summoned personally George W. Pennock: so answers. We now go back. On the day on which the *præcipe* for the writ was put into the office, viz., 20th January 1841, a narr. was filed. The declaration, after stating the plaintiffs as above, says: who “complain of George W. Pennock, who has been summoned to answer the plaintiffs in an action of trespass on the case; for that whereas the defendant and Joel Pennock, (who was joined as defendant in the writ in this suit, but who was not summoned, as appears by the record), lately trading under the firm of G. W. & J. Pennock,” and then goes on in the usual form against them for goods sold and delivered.

Here we notice that a declaration, filed before the writ was delivered to the sheriff, states that they were summoned, but the writ had not been served on Joel, as appears by the record, and the summons not yet either served or returned. It then presents a case of a suit against one of two persons stated to be partners in the writ. In England, from whence we derived our laws, if a writ issued against two or more, and one could not be found, the plaintiff was obliged to proceed to outlawry against such defendant on whom the process could not be served, before taking any steps against the defendant on whom the process had been served. In this State the universal practice has been, if the sheriff cannot find one of defendants, to return *non est inventus* as to such one; or if the process is a summons, and one does not reside and cannot be served personally, the sheriff returns *nihil habet* as to such one; and such return being made by the sheriff on his writ, the plaintiff proceeds against him or them who are summoned, (this return being stated in the declaration), as is done in England on an outlawry of one. The proceeding in this case is a step in advance of our practice and of the law. I shall not inquire whether this proceeding occurred from design or accident. It is an attempt to recover from one of two persons, stated by the plaintiff to be partners, what, by his own showing, is due from both; which cannot be done: but it is more; it is an attempt by one partner (for Joel is a plaintiff) to recover from or to compel his partner to pay what he owes as much as that partner does. The Act of 6th April 1830 cannot be so construed as to assist the proceedings in this

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case. It was framed to cure a defect in the law, which exempted a defendant, on whom the sheriff for any cause could not serve process, from any future suit. At that time a partner could not, except where there had been a settlement of accounts, sue in *assumpsit* another partner; nor was it possible, as the law then stood, that the same person should be plaintiff, or one of plaintiffs, and also defendant, or one of several defendants, in the same suit; except perhaps where a partner sold an article or articles or performed work for a firm of which himself was one; and if this could be done, it must be on a special contract and for an agreed sum.

By the Act of 14th April 1838, it is provided that "no action now pending on a writ of error or otherwise, or hereafter to be brought by partners or several persons against partners or several persons, shall abate or the right of such partners or several persons plaintiffs to sustain their action be defeated by reason of one or more individuals being or having been members of both firms, or being or having been of the parties plaintiffs and also of the parties defendants in the same suit, nor shall the judgment rendered thereon, if still pending on a writ of error, be affirmed against the right of such plaintiff or plaintiffs to sustain such action, nor reversed for the purpose of defeating such right, but the same shall proceed to trial and judgment as though the parties plaintiffs and defendants were separate and distinct persons," and then proceeds to direct as to the evidence, &c. But this Act, if still in force, would not avail the plaintiffs in the case before us; for Joel Pennock is not a party both plaintiff and defendant, but carefully left out as defendant; and if this judgment could be supported and an execution levied on the partnership property of the defendants, yet the individual property of Joel could not be reached, while the whole of George's property would be sold to pay Joel for a debt of which Joel ought to pay one-half.

But, it would seem, the Legislature were soon aware that this Act, if the judgment were carried out by execution, might work the most palpable injustice, and by Act of 13th October 1840 they gave to the Supreme Court and the several Courts of Common Pleas all the power of a Court of Chancery in settling partnership accounts, and all other such accounts and claims as by the common law and usages of this Commonwealth have heretofore been settled by action of account-render, &c.

We had before us a case from the District Court of Allegheny, in which Church, M'Vay and Gordon had recovered a judgment for a large amount against Church & Tassey, and taken execution and levied on the real estate of Tassey. On an application to the court by bill stating that Church (who was both plaintiff and defendant) owed Tassey a much larger sum than the amount of said judgment, the court granted an injunction staying proceeding on the levy on real estate until an account was taken of the real estate of accounts between the parties, Church & Tassey; and we

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affirmed the proceedings. It was not possible to conceive, that, so far as the money to be levied would go to Church, the Legislature ever intended the property of a man, who at the time of commencement of the suit and of the judgment and execution was a large creditor of one of the plaintiffs, should have his property sold on a proceeding in court, in which he could not avail himself of the facts; and it was considered that although the suit at law might adjust the accounts between the firms, yet after that was done, a proper case was made out for the equitable interference of the court. In this case, however, there is no legal judgment under any law, common or statute, and nothing on which the jurisdiction of a court of equity can act, as in the case last mentioned.

But, it was said, the party defendant might have demurred to the declaration or moved in arrest of judgment. This I admit; but he was not compelled to do so. There are cases, too, in which a verdict cures a cause of action defectively stated, because this court would presume, after verdict, that all which was necessary to a recovery had been proved at the trial; but where the whole proceedings are in a shape unknown to the law and contrary in their effect to every principle of justice, and nothing could have been proved on the trial which could cure the illegality, we must reverse the proceedings.

Judgment reversed.

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Aycinena against Peries.

The commissioners under the Spanish treaty awarded a large sum of money to be paid to J. Y. for himself and others. J. Y. was the agent of certain ship-pers, owners of property seized in South America by the Spanish government, and the plaintiff, an attorney there, had a claim on the fund for services and advances recognised by J. Y. and others interested.

Held, 1. That it was a decree in favour of the plaintiff for the amount of his claim.

2. That all parties having acquiesced in the justice of the plaintiff's claim, it amounted to an appropriation, and equity would direct the money to be brought into court and award payment out of it first to the plaintiff.

3. That the plaintiff had constructive possession of the fund and an equitable lien on it, from his having been the efficient person by whose means the money was ultimately recovered, and having parted with the documents at the request and for the convenience of the other parties interested.

A defendant holding funds in his hands as a stakeholder or for the benefit of others, may be sued in *assumpsit* for money had and received and a special judgment and execution had on equity principles applied in Pennsylvania in common law forms of proceeding, and the court will control the execution of the process by ordering the money to be brought into court or otherwise.

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The Act of Assembly conferring on the courts chancery power in certain cases, does not oust the jurisdiction of the common law courts exercising equity under common law forms. They are concurrent remedies, and a plaintiff may elect either.

One having funds in his hands as stakeholder or agent for others, may be sued, though he has never been called on to settle his accounts in the Common Pleas, and though he is administrator *de bonis non* of one from whom the funds passed; such property forming no part of the estate of the testator, and not being within the jurisdiction of the Orphan's Court to settle and distribute.

Bringing suit against the personal representatives of such testator does not conclude the party interested from proceeding against the fund, inasmuch as he has two remedies, *in rem* and *in personam*, and may pursue both till satisfaction.

An award of money by the commissioners under the Spanish treaty, excluding such persons as are not citizens of the United States, does not exclude an attorney in a foreign country, who for advances and services there has a lien on the fund claimed and awarded.

THIS was an action of *assumpsit* for money had and received, brought in this court by Mariano de Aycinena, executor of Juan Fermin de Aycinena, against Adolphus Peries. It was tried before ROGERS, J., at Nisi Prius, and now came before this court on certificate of error. The facts are fully stated in the opinion of the court.

The case was argued by

W. B. Reed and Meredith, for the plaintiff in error.
Binney, Jun. and Randall, contra.

The opinion of the Court was delivered by

ROGERS, J. — This is an action for money had and received, in the nature of a bill in chancery, to recover a fund in the hands of the defendant, in payment of the amount of a judgment recovered by the plaintiff from the defendant as the administrator of James Yard, deceased. After the evidence was closed, the court charged the jury, that this was an action for money had and received, brought by the executor of Fermin de Aycinena against A. Peries. That to maintain the action it was necessary for the plaintiff to show that he did now, or at one time had owned the money sought to be recovered. That there was a fund which had come into the hands of the defendant when he took letters of administration to Mr Yard's estate, and whether it came into his hands as administrator, as attorney for the executrix or as trustee, was entirely immaterial. That the defendant was only responsible for the administration of the fund since the death of Mrs Frelinghuysen. That the plaintiff, in point of law, had a right to this fund in the hands of the defendant, superior to that of the co-shippers of the Asia and the Dolly, or any other person, except the Marquis Vicente de Aycinena. That the plaintiff by bringing his suit for the same claim against the defendant as administrator, or against Mrs Frelinghuysen as executrix of Mr Yard, had not impaired his right to or concluded himself from proceeding against this fund. That

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the fact of the accounts of the defendant as administrator *de bonis non* of James Yard, including the accounts of this whole fund, having been filed in the Orphan's Court and being now before an auditor, afforded no defence in this case, notwithstanding the counsel for the plaintiff had appeared and taken part before the auditor and had the defendant under examination in relation to the accounts of this fund. And finally, that in point of law the plaintiff was entitled to recover. The jury, under the direction of the court, found the following verdict:

"The jury find for the plaintiff the sum of \$49,580.19. This sum is composed of the following items:

Amount of compromise paid to Echevaria at Guatemala by plaintiff, as Yard's attorney, in the business of the Asia and Dolly, December 19, 1816, with interest, ...	\$23,460.39
Amount of judicial costs paid by plaintiff at Guatemala, in the same business, Dec. 31, 1821, with interest, ...	14,649.95
Amount of money paid by plaintiff for expenses at Guatemala, in same business, with interest, ...	3,420.47
Amount of commissions, 7-12ths of 6 per cent. commission on \$202,349.87, for plaintiff's services, with interest, ...	8,049.38
	<u>\$49,580.19</u>

Subject to the opinion of the Judge upon the law and evidence, with liberty for the defendant to take an appeal by bill of exceptions to the Supreme Court, agreeably to the Act of Assembly. In case judgment should be rendered finally for the whole or a part of the verdict, then the plaintiff shall be at liberty to issue execution, or process in nature thereof, and levy on or attach the notes, stocks and securities in the schedule annexed, now held by the defendant as administrator *cum testamento annexo* of James Yard, said judgment not to be entered against the defendant generally, but only for the purpose of levying upon or attaching and selling the said notes, stocks and securities. Execution to be issued subject to the right of the Marquis of Aycinena, under the direction of the court."

In the trial, to the charge of the court and to the verdict of the jury, the defendant has filed the following specification of errors:

1. The admission in evidence of the memorial of James Yard, dated 22d February 1822.

2. The admission in evidence of the several documents referred to in the 2d bill of exceptions.

3. The Judge erred in charging the jury that in point of law the plaintiff had a right to the fund in the hands of the defendant, superior to that of the co-shippers in the Asia and Dolly, or of any other person, except the Marquis Vicente de Aycinena.

4. In saying that the plaintiff, by bringing his suit for the same claim against the defendant as administrator, or against Mrs Frelinghuysen as executrix of Mr Yard, had not impaired his right to or concluded himself from proceeding against the fund.

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5. In saying that the fact of the accounts of defendant, as administrator of Yard, including the account of the whole of this fund, having been filed in the Orphan's Court and being now before an auditor, afforded no defence in the case, notwithstanding the plaintiff's counsel had appeared and taken part before the auditor, and had the defendant under examination in relation to the accounts of this fund.

6. In saying that in point of law the plaintiff was entitled to recover.

Under these errors all the points made in the argument may be fairly considered. The following facts will give a general outline of the case.

In the year 1800 James Yard, in behalf of himself and others, shipped by the ship *Asia* and the brig *Dolly*, to South and Central America, valuable cargoes. The shippers on board the *Asia* and the *Dolly* were not the same, but different persons; but, so far as it appeared to the world, James Yard was the owner of the vessel and cargo, it having been left entirely out of view that any other persons were concerned in the shipments. The cargoes, on their arrival at Callao, in the year 1801, were seized by the order of the government of Peru, and the proceeds deposited in the royal treasury at Lima. Mr Yard, in consequence of his severe loss in this adventure, took the benefit of the Bankrupt Law, and, in the year 1803, representing his assignees and other persons who were concerned in the shipment in question, from whom he had received the most full and plenary powers, went to Spain to seek redress. In the prosecution of this claim by virtue of said powers, which were never revoked or in any way questioned, but always ratified and confirmed by the persons interested, Mr Yard, who held himself out as the owner of the ship and cargo, with the assent of the shippers, appointed in 1808 the Marquis of Aycinena as his agent to prosecute the claim on the government of Guatemala, for the unlawful seizure of these cargoes. The Marquis of Aycinena during his lifetime prosecuted the claim, and, upon his death, Fermin de Aycinena, his brother and executor, succeeded, according to the laws of Guatemala, to the agency, which thus devolved upon him. Fermin de Aycinena carried on the business of his agency, laid out and expended monies in behalf of the agency and necessarily connected with its successful prosecution, gave his diligent services in the business, and kept Mr Yard, whom alone he knew in the transaction, apprised of the state of the business. Mr Yard recognised him as his agent.

Fermin de Aycinena having prosecuted the claim upon the government of Guatemala for many years, finally established the rights of Mr Yard and obtained a decree for the payment of the money. The money was decreed to be paid to Fermin de Aycinena himself, without any mention of his principal, Mr Yard. Just as Fermin was about to receive the amount so decreed to be paid to

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him, the taking of Pensacola suspended the proceedings, and shortly afterwards the Florida treaty was promulgated, which transferred the settlement of the claim from the Spanish government to a commission created at Washington.

In a letter from Mr Yard to the Marquis of Aycinena dated April 17, 1815, he acknowledges the services of the Marquis, and says: "It is now understood that some arrangement is about to be made between the governments (Spain and the United States) for adjusting all claims, as well private as public, and that commissioners will be appointed, as in former instances, before whom the claims will be substantiated. It is my intention, in this case, to bring my whole case before them, from the commencement to its conclusion. In order to do this effectually, the documents respecting the decision of the arbitrators in the concerns of the creditors, as well as any others that may have taken place in regard to my affairs subsequently to the last which your excellency sent me, will be necessary, and I shall be thankful to have them sent to me as soon as possible."

Under this commission Mr Yard, in behalf of himself and the other shippers, who had, as before stated, duly constituted him their attorney in fact, presented his memorial to the commissioners under the Florida treaty. In this he acknowledges the services rendered by Fermin de Aycinena, as his agent, and refers to the documents and letters forwarded to him from both Fermin and the Marquis de Aycinena, as vouchers to sustain his case.

The board, at first, rejected the claim, but afterwards, viz. 16th February 1824, made the following order:

"Ship Asia, Peterson, — Brig Dolly. — The board having heretofore received, examined and allowed this claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants the sum of one hundred and thirty-six thousand two hundred and sixty-five dollars, in full, for the loss sustained in the arrest of those vessels at Callao by order of the Spanish authorities, and the sale of their cargoes in 1801, *which sum is to be paid to James Yard for himself and others.* \$136,265.96."

This fund was always kept separate and distinct from his own property. It was so treated by Mr Frelinghuysen and by Mr Peries, the defendant. Mr Peries expressly says, that the fund had never been considered by Mr Yard or any one else as in the remotest manner connected with his (Yard's) estate, but, on the contrary, was placed in Mr Peries' hands for the express purpose of keeping it distinct therefrom.

That the parties knew of this claim appears from a letter of the 5th August 1835, to Messrs Ingersoll and Chauncey: "It is necessary further to state that the *representatives* of the Marquis of Aycinena have brought forward a claim upon the fund amounting

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to more than \$40,000, for his services and expenses in Guatemala and Peru. It is understood that the representatives insist upon the whole amount, and are about to commence a suit. Of course, whatever they may recover will constitute a deduction, the nature and application of which to the different interests cannot now be ascertained."

Mr Peries, in a letter dated October 9, 1834, addressed to the young Marquis of Aycinena, says: "J. Yard made a claim to reserve a sum to provide for expenses incurred at Guatemala. The amount estimated to be sufficient for this purpose was \$5000, and a proportional part of that sum was allowed to be reserved."

The case will be considered in the order of the exceptions; and, as to the two first, it is enough to say they have been abandoned. The facts which bear upon the third error, which are borne out by the testimony in their fullest extent, established by proof which cannot be controverted or denied, are chiefly these. James Yard was to all the world, and particularly to the Marquis of Aycinena and his successor, the owner of the ship *Asia* and the brig *Dolly* and their cargoes. As between them no other person was known in the transaction. Mr Yard was the principal, and they were his agents. In consequence of the unremitted attention of the agents to the business intrusted to their care, continued for a long space of time, repeatedly acknowledged by Mr Yard, and about the value of which there can be but one opinion, together with the expenditure from their private funds of a large sum of money to effect a compromise with a person of the name of Echeverria, and the payment from the same source of other large sums of money for legal costs incurred in the regular prosecution of the claim, and which, it appears, were absolutely necessary to its successful termination, he at length, after great delay, succeeded in obtaining a decree that the amount of the claim, viz. \$202,000, should be made to him, Fermin de Aycinena. No notice is taken of Mr Yard, but the decree is that the money be paid to the plaintiff, who alone, under that adjudication, was authorized to receive it. After that decree nothing remained but to receive and transmit the money to his principal. Of the precise state of the business Mr Yard was regularly informed. In a letter dated the 18th July 1818, the plaintiff announces to his principal that all difficulty as to the receipt of the money in the treasury at Lima, was removed, and he offered, as soon as he was put in possession of it, to remit the same in indigo, furnishing, at the same time, a specific note of the quantity, quality and price. And in a subsequent letter dated the 3d September 1818, he advises Mr Yard of his having a decree for the amount of the fund in the treasury at Guatemala, which had been transferred from that of Lima by order of the president of Guatemala. At this time such progress had been made (as appears from the memorial of Mr Yard) that it only remained to receive the official order of the president of Guatemala for payment

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of the amount claimed, in consequence of which, viz. the expectation of the immediate receipt of the money, the proposition for a remittance was made. Matters stood in this condition when the business was suspended by the news of the taking of Pensacola and the strong probability of an immediate rupture between the United States and Spain. But for this untoward event, the money awarded would have gone into the actual possession of the plaintiff; and, had it been received by him, no person will question his right to retain for his services and expenditures; for it cannot be denied that in cases of agency there exists a particular right of lien in the agent for all commissions, expenditures, advances and services in and about the property or thing intrusted to his agency, wherever they were proper or necessary or incident to the business. That the expenditures and services of the plaintiff were of that description, has been established by the verdict of a jury, and also by the most positive proof, arising from unqualified admissions of the parties of their highly meritorious and useful character. Indeed, from a survey of the facts in evidence, we cannot withhold our belief that without the powerful and efficient aid of the agents, this fund would never have been realized. Thus the parties stood, when, as a consequence from the Florida treaty, the case was transferred from Guatemala to the city of Washington. Then it was that Mr Yard, armed with the documents furnished by the plaintiff, and particularly the decree, which established the right to remuneration from Spain, presented his memorial to the commissioners. The first attempt was unsuccessful; but afterwards, viz. 29th July 1823, the board proceeded as follows:

“James Yard, for himself and others.—Ship Asia and brig Dolly.

“Upon examination of the testimony filed in support of this claim, the board are of opinion that it be allowed as valid for their proportion of the nett proceeds of the cargoes of these vessels deposited in the royal treasury at Lima. From which must be deducted such sums as are claimed by those who are not citizens of the United States; and also any sum which is claimed under any person who was not such citizen at the time of the loss.”

On the 16th February 1824 the board proceeded to make a final decree.

“Ship Asia, Peterson,—Brig Dolly.—The board having heretofore received, examined and allowed this claim as valid, this day proceeded to ascertain the amount thereof, and do award to the claimants the sum of one hundred and thirty-six thousand two hundred and sixty-five dollars, in full for the loss sustained in the arrest of those vessels at Callao by order of the Spanish authorities, and the sale of their cargoes in 1801. *Which sum is to be paid to James Yard for himself and others.* \$136,265.96.”

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When it is remembered that the decree in Guatemala was that the money should be paid to Fermin Aycinena, and that this document was the foundation of the award of the commissioners, it would not have been unreasonable for him to suppose that the decree of the commissioners should order the money to be paid to him in whom the legal title to the money was vested; and, had this been done, the plaintiff would have had the right, as no person can dispute, to appropriate the proceeds, in the first instance, to the repayment of his advances on account of the fund, and in payment for the services he had rendered in and about this complicated business. But this, which, it may not be going too far to say was the legal course, the commissioners, for some reason, did not think proper to pursue. Influenced, perhaps, by the fact that the plaintiff was a foreigner at a distance, and that Mr Yard was a citizen and on the spot, and that there had already been great delay in obtaining redress for the injuries the shippers had sustained, they make a special decree, by which they direct the money to be paid to *James Yard, for himself and others*. The commissioners do not undertake to ascertain those persons interested in the fund, but they leave that to future inquiry. What, then, is the construction that we ought to give this decree? and, it appears to me, that from a consideration of all the facts connected with the transaction, the decree includes the rights of the plaintiff as well as others interested in the fund; that it is a decree in favour of Fermin de Aycinena, who was legally entitled to recover the money, and Mr Yard held subject to his claim and to the amount of his legal responsibility. It also appears to me that the fund is primarily liable to the extent of his debt, and upon every fair principle should be first paid; because, although a strictly legal right of retainer may not exist, yet there is an overwhelming equitable claim to a portion of the fund arising from his meritorious services, by which, in truth, the fund received its being. The case must be treated precisely as if the money was now in court for distribution; for the suit, as will hereafter appear, is but a means of giving this court a control over the fund, in which event a Court of Chancery would do justice to the parties by ordering the amount of the plaintiff's claim to be first paid, and the balance, whatever it may be, to be paid to the shippers. It would be against all the principles of equity to order the money to be paid to the shippers, and turn the plaintiff over to a remedy against them, or to a more than doubtful remedy against an insolvent estate. Having the fund under their control and all the parties, they would have the power to do justice in the manner above stated. And this is unquestionably the view taken of it by the parties in interest. Mrs Frelinghuysen, the executrix of Mr Yard, in a letter to Mr Peries, and in answer to one from Messrs Ingersoll and Chauncey on behalf of the persons interested in the fund recovered under the Florida treaty, says: "You will also notice

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to those gentlemen (Messrs Ingersoll and Chauncey) the claim made by the representatives of the late Marquis of Aycinena, which, if established, will most seriously affect the amount to be distributed." In compliance with this, Mr Peries, in a statement accompanying a letter to Messrs Chauncey and Ingersoll dated the 5th August 1835, says: "It is necessary further to state that the representatives of the Marquis of Aycinena have brought forward a claim upon the fund amounting to more than \$40,000, for his services and expenses in Guatemala and Peru. The account has been exhibited to the counsel of the creditors, Messrs Chauncey and Ingersoll. It is understood that the representatives insist upon the whole amount, and are about to commence a suit. Of course, whatever they may recover will constitute a deduction, the nature and application of which to the different interests cannot now be ascertained." So also Mr Peries, in an answer to a letter from the Marquis of Aycinena asking information as to the amount of the fund and its disposition, says: "J. Yard made a claim to reserve a sum to provide for expenses incurred at Guatemala. The amount estimated to be sufficient for this purpose was \$5000; and a proportional part of that sum was allowed to be reserved in making the payments above stated, which, of course, is subject to the same contingencies as the payments."

Thus it appears that all parties interested in the fund, without exception, acquiesced in this disposition of it, showing thereby their construction of the award, and further showing a distinct appropriation of the proceeds as primarily liable for the payment of these claims. It was the understanding of all the parties that the persons interested in the shipment were only entitled to the balance which remained after paying for the services rendered by the agents, which, in their apprehension, constituted a proper deduction from the amount of the fund. If, then, this amounts to an appropriation of the money, which it unquestionably does, a Court of Chancery will not suffer it to be distributed. All the parties having assented to the appropriation, the fund comes into the hands of Mr Yard clothed with a trust, and this by the act of the persons competent to create and establish it. This head of equitable jurisdiction is noticed by Judge STORY, in his *Equitable Jurisprudence*, page 307. And in *Clemson v. Davidson*, (5 Binn. 398), Chief Justice TILGHMAN says: "Any order, writing or act, which makes an appropriation of a fund, amounts to an equitable assignment of that fund. The reason is plain, the fund being neither assignable at law nor capable of manual possession, an appropriation of it is all that the nature of the case admits. A court of equity will therefore protect such appropriation and consider it as equal to an assignment."

This case does not come, as may be safely admitted, within the general principle of lien; for a lien is defined to be a right in one man to retain that which is in his possession belonging to another,

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until certain demands of him, the person in possession, are satisfied. Goods subject to a lien are in the nature of a pledge, which, being personal, cannot be transferred: so that if the goods are parted with, the lien, in general, is lost. But this rule is subject to qualification. For, where an agent who has a lien on property to a certain amount, deposits it as a security to that amount, apprising him of the lien and appointing him to keep possession as his servant, the lien is not thereby extinguished. *M'Combie v. Davies*, (7 East 7); *Man v. Shiffner*, (2 East 529). Where securities, on which the holder had a lien, were parted with in contemplation of their being replaced by another security, which did not take effect by the substituted security's proving unavailable, it seems to have been the opinion of the Court of King's Bench that allowance in account might be claimed to the amount of the lien. *Vernon v. Hankey*, (2 T. R. 119). So a factor, by parting with the possession of goods, does not forfeit the benefit of his lien when he sells them according to his authority. For as it would be productive of great inconvenience if a factor could not sell goods committed to him for sale without losing the security he has by the possession of them, it has been determined that the proceeds or securities are subject to the same deductions or lien which the goods in specie were. *Cowp.* 251; 3 B. & P. 449. These are equitable exceptions to the general rule, and the same principle may be applied to this case. The plaintiff had the possession of all the documents on which the claim was founded, and, for the convenience of all the parties, he parted with them. It would, therefore, be unjust that by this act he should be deprived of the lien which he unquestionably would have had if the money had come into his hands. It may then be viewed as a qualification of the general rule applicable to liens. Besides, possession need not be actual. There may be a constructive possession of the thing by the party asserting it, with the express or implied assent of the party against whom it is asserted. True, a lien is a right to retain a thing, which presupposes a lawful possession, which can arise only from a just possession under the owner or other party against whom the claim exists. But the possession need not be the actual possession of the party himself; for it is sufficient if the possession be by his servants or agents in the proper discharge of their duty. Neither need the possession always be direct and actual. It is sufficient if it be constructive and operative in point of law. Thus when property is at sea, the delivery and endorsement of the bill of lading will confer a constructive possession sufficient to create a lien. So the delivery of a chose in action or other document or muniment of title, will in many cases give a good lien upon the property represented or intended to be conveyed thereby. The delivery of a bill of sale of a ship at sea will be a constructive possession sufficient to sustain a lien if the ship is taken possession of within a reasonable time after her return. So the delivery of a

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policy of insurance will give a lien thereon : as will the delivery of a promissory note to collect and receive the amount. These principles are supported by numerous authorities, all of which are collected in *Story on Agency* 373, *sect.* 363. If, then, Mr Yard is to be considered as the agent of the plaintiff, having received the money for his use as well as others by virtue of a decree made in his favour and the documents furnished by the plaintiff, and this has been subsequently recognised by all the parties in interest, it gives the plaintiff such a constructive possession of the fund as to sustain a lien in his favour for the amount of the monies advanced by him on their account and the services rendered as their agent. Here I will remark that there is no express agreement, nor is there anything in the transaction which would lead to the opinion that the plaintiff trusted to the personal credit of Mr Yard or the other shippers. Indeed, the whole transaction evinces that such was not the understanding of any one of the parties. They all viewed the proceeds, the fruit of the services rendered by the plaintiff, as the primary fund for the liquidation of his claim. And this is not only according to law, but it is founded on principles of natural justice. It would be unjustifiable in the extreme to give the fund to the shippers, and turn him over to a more than doubtful remedy against an insolvent estate. It would not only be unjust to him, but to the creditors of Mr Yard ; for, let it be remarked, that the contest is not between Mr Yard's estate and the plaintiff, but the plaintiff and the shippers, who are endeavouring to obtain the fund without paying the advances made on account of it or for the services by which it was created. And although it may not strictly be a lien, may it not be viewed as a right or charge upon the thing itself ? Thus there are liens recognised in equity whose existence is not known or admitted at law. *Gladstone v. Birley*, (2 *Meriv.* 403). In regard to these liens, it is true, it may be generally stated that they arise from constructive trusts ; they are, therefore, wholly independent of the possession of the thing to which they are attached as a charge or encumbrance ; and they can be enforced only in a court of equity. Of this we have a strong illustration in the well-known doctrine of courts of equity, that the vendor of land has a lien on the land for the amount of the purchase money, not only against the vendee himself but also against all subsequent purchasers having notice that the purchase money remains unpaid. In the extent of the lien the vendee becomes a trustee for the vendor ; and his heirs and all other persons claiming under them with such notice, are treated as in the same predicament. Indeed, the whole doctrine of implied trusts, of which Mr STORY, in his *Equity Jurisprudence*, page 480, has given numerous instances, has given many examples showing the extent to which a court of equity will go in following the fund and appropriating, upon principles of pure equity, without regard to the technical principles of the common law.

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The principles already established evince the inapplicability of the case of *Worrall v. Harford*, (8 Vez. 4). The indemnity of the trustees under a deed of trust does not give the persons employed by them a right as creditors against the trust fund. Thus persons employed by the plaintiff would not be creditors of the trust fund. That is admitted; but it by no means follows, that because they would not be creditors of the fund, the plaintiff is not, under the peculiar circumstances of this case, entitled to come in in virtue of his equity.

It is said that the equity of the plaintiff is impaired because of the award of Messrs Binney and Sergeant, "that James Yard is to be exclusively responsible for any claim by the Marquis of Aycinena or his representatives for services rendered in the said cases, and for counsel, clerk hire, and translating in aid of the claim before the commissioners." If the Marquis of Aycinena or his representatives had been parties to the submission, there would be great force in the argument. But as they had nothing to do with it, they cannot in any manner be affected by it. Besides, the award only throws upon Mr Yard payment for services, and cannot be made upon any principle of construction to cover a claim for money advanced to effect a compromise, and in payment of legal costs, which, as appears from the verdict, which is special in its character, constitutes three-fourths of the demand.

Nor do I see much force in the objection that the claim has been delayed. It appears that it was known before the final distribution of the fund, and the reason it was not forwarded at a more early date appears from Mr Yard's statement for the arbitrators, 10th May 1825. Mr Yard says: "The charge for the services of the Marquis of Aycinena and his executors is not ascertained, no claim having as yet been preferred from the party in Guatemala: owing probably to the disturbed state of that country, no estimate of the amount that will be called for on this account can be formed; but some estimate may be formed of the extent of the labour and service," &c. He states it resulted in a favourable decision, after seven years of contest, and fixed the rights of the claimants to the fund. And further: "the value of the services rendered by the Marquis Aycinena, &c. cannot be fixed by Mr Yard. He only knows that the ordinary commercial commissions at Guatemala is eight per cent. He only requires that he should be indemnified for the responsibility which the nature of the claim compelled him to assume." And this explains the reason that the arbitrators confined the award to his assumption of responsibility for the services of the Marquis. They could not with any propriety go further; for the amount of his advances, as appears from this statement, was not known.

The award excludes such persons as are not citizens of the United States, and also any sum which is claimed under any person who was not a citizen at the time of the loss. This part of

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the award evidently refers to the shippers, some of whom were foreigners, and with no propriety can be construed to extend so far as to exclude the claim of the plaintiff, although a foreigner.

For these reasons we are of the opinion that there was no error in charging the jury that, in point of law, the plaintiff had a right to the fund in the hands of the defendant superior to that of the co-shippers in the Asia and Dolly, or of any other person except the Marquis Vicente de Aycinena.

But it is urged that the plaintiffs, by bringing suit against the personal representatives of Mr Yard, have concluded themselves from proceeding against the fund: but we are not of that opinion. It is true, that Mr Yard was personally answerable to his agents, but an assertion of this right by suit, but without satisfaction, is not inconsistent with a lien or an equitable right to the fund. A factor, as has been held, does not lose his right to a lien on the goods by a suit against the principal for compensation for services rendered as agent. *Story on Agency* 393. We close this part of the subject, in relation to lien by agents, by remarking that the mere fact that an agent has a lien upon the property confided to him, either for his commissions, advances, disbursements or expenses upon that property, or for his general balance of account, does not limit the right of the agent to that mere fund; but the principal is still liable to him personally in a suit *in personam* for the amount of the same claims. For, by the general rule of law, an agent in such cases trusts both to the fund and to the person of his principal. From this it follows that an assertion of one remedy, short of satisfaction, is no abandonment of the other. The agent may resort to one or both remedies, as he may think expedient and proper. For this many authorities are cited by the commentator, which abundantly support the text. The books are full of cases where a party has two securities, one *in rem*, the other *in personam*, as, for example, a mortgage accompanied, as it usually is, with a bond. It has never yet been supposed that by suit on the bond you impaired your right to your real security. Indeed, in some cases, it is convenient at least to ascertain the amount due by suit before you attempt the subject, the fund, which may be an ancillary security for the debt. The cases cited by the defendant do not apply, for those, as in *Merrick's Estate*, are cases which depend on the doctrine of election. Undoubtedly, a principal may elect to consider one of two persons his debtor, and by suit against one may lose all remedy against the other.

The court is further of the opinion that the accounts of the defendant, as administrator of Yard, including the accounts of the whole of the fund, having been filed in the Orphan's Court and being now before an auditor, affords no defence in the case, notwithstanding the plaintiffs' counsel appeared and took part before the auditor and had the defendant under examination in relation to the accounts of this fund. The Orphan's Court have no juris-

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diction over the fund, as it has been already shown that it forms no part of the estate of Mr Yard, being always kept separate and distinct from his property by him, his executrix and Mr Peries. Whether we consider the several persons who had the custody of the fund as trustees or stakeholders, they cannot in that character be amenable to the jurisdiction of that court, who have power to settle the estate of the testator, and nothing more. This fund belonging to others and not to him, it would be contrary to every principle of right to blend it with his property for the benefit of creditors of his estate. That counsel appeared before the auditor and examined the defendant in relation to the fund, amounts to nothing. From the course which had been lately adopted, this became necessary, and they may have thought themselves compelled to appear to protect their rights by protesting against the intended use of the fund.

Under this head the counsel for the shippers, who have been permitted to appear and defend their interest, have started another objection, which is equally untenable. They contend that the defendant is a trustee, and that no suit can be sustained until after he has settled an account. For this position they rely on *Gray v. Bell*, (4 Watts 410); *Rush v. Good*, (14 Serg. & Rawle 231), and *Vanarsdale v. Richards*, (1 Whart. 408). True, the assignees under a voluntary assignment are not liable in an action for money had and received before an account has been settled and decree made by the Court of Common Pleas. But this is not an assignment, and I know of no law which gives jurisdiction to the Court of Common Pleas to compel the settlement of an account in a case like the present. It is a mistake to suppose that Mr Peries is a trustee within the meaning of the Acts in relation to this subject. He received the money, and has it now in his custody for the benefit of all who may be interested in its distribution, but he can in no sense be considered a trustee but as a stakeholder or recipient of the money for the use of the shippers and others. And this, I think, will clearly appear from the history of the transaction already given.

And, considering the defendant in the light of a stakeholder, all difficulty whatever in sustaining an action for money had and received is removed, except what arises from the unsatisfied claim of the Marquis of Aycinena, who has an equal right with the plaintiff to participate in the fund. And this consequence necessarily follows from the proposition which it has been the object of the preceding remarks to establish, that the plaintiff's right to the fund in the hands of the defendant was superior to that of the co-shippers by the Asia and the Dolly or of any other person except the Marquis Vicente de Aycinena. It is true, that in order to support an action for money had and received, at common law, a privity of contract must exist between the plaintiff and defendant, and a consideration either express or implied. The defendant, standing

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in a fiduciary character, with money in his hands belonging to the plaintiff, there was both privity of contract and sufficient consideration to support *assumpsit*. But this case, at the trial, was not rested on common law, but equitable principles, and hence a special judgment was entered. Justice may have been had on the equity side of the court, and perhaps that would have been the best mode of attaining it. But, be this as it may, it does not follow that in Pennsylvania the remedy may not be had in a common law action. Although frauds, accounts and trusts are proper objects of a court of equity, it is by no means true they are exclusively cognizable therein. On the contrary, fraud is, in many cases, cognizable in a court of law; and sometimes a fraud in obtaining a will or devise of land is exclusively cognizable there. Many cases of accidents are remediable at law, such as loss of deeds, mistakes in accounts and receipts, impossibilities in the strict performance of conditions, and other like cases. And even trusts, though in general of a peculiar and exclusive jurisdiction in equity, are sometimes cognizable at law; as, for instance, cases of bailment, and that large class of cases where the action for money had and received for another's use is maintained *ex æquo et bono*. 3 *Black. Com.* 431, 432; 1 *Wood. Lectures* 208, 209; 1 *Story's Equity* 96, sect. 60. In conferring on the court chancery powers, it does not oust the jurisdiction of the common law courts; for if it were so, there would be an end to the equitable action of ejectment, or other like remedies, where we have always administered equity through the instrumentality of common law forms. If the Legislature intended so great a change in the law, they would have expressed their meaning in clear and unambiguous terms. We cannot infer such an intention from the grant of additional equity powers. In some parts of the State, the courts are not clothed with equity powers to the same extent, from which it would follow, if we adopt the views of the defendant's counsel, one remedy would be good in one county, and a different rule would prevail in another. We therefore perceive no obstacle in the way of the plaintiff from the concession that he may have relief on the equity side of the court. They are concurrent remedies, either of which he may pursue at his election.

The question, therefore, recurs, whether he is entitled to relief in this form of action. This suit was considered at the trial as in the nature of a bill in chancery with the great object of getting the possession of the fund and bringing it under the supervision and control of the court. A special judgment was rendered; and in case judgment should be finally rendered for the plaintiff, then the plaintiff was to be at liberty to issue execution or process in nature thereof. The execution is to be issued subject to the right of the Marquis of Aycinena, under the direction of the court. The verdict and judgment give the court the entire control of the process, and the money arising from it; they will then take care

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to distribute it among all persons who may have any interest in it. After the case of *Martzell v. Stauffer*, (3 P. R. 398), where this question was attentively considered and the peculiar law of Pennsylvania on this subject examined, we think the power of the court to give equitable relief in the action for money had and received cannot be questioned. It was put on the impregnable ground that without this power in the court justice could not be done, and that there would be a wrong without a remedy. The court pointed out the mode of administering relief by placing the money at the disposal of the court, by controlling the process by an order endorsed on the execution directing the sheriff to bring the money into court, or by a special judgment, which was the mode adopted here. This, we conceive, gives us the entire control of the fund, which we will take care to distribute upon the equitable principles which have been already intimated. It is proper to remark, that whether the defendant's claim for his services may be determined in this case is still open for investigation.

Judgment affirmed.

Maffit *against* Clark.

Father seised of land died intestate, leaving two children, infants, one of whom soon after died and afterwards the other, unmarried and without issue, the mother living. *Held*, that the brothers of the father took the estate by descent under the 9th section of the Act of 8th April 1833, and not the mother.

ERROR to the Common Pleas of *Chester* county.

Sally Maffit against William Clark. This was a case stated as follows:

The fee-simple interest in the tract of land in dispute was vested in the Rev. Cyrus H. Jacobs. He died on the 14th September 1836, intestate, leaving a widow, Jane W. Jacobs, and two children, Anna Maria Jacobs and Lucy Strawbridge Jacobs, both infants. Of these the said Lucy Strawbridge Jacobs died in the month of November of the same year, intestate, unmarried and without issue, leaving her mother and sister to survive her. In the month of February in the year following, the said Anna Maria Jacobs died, also intestate, unmarried and without issue. Subsequently, to wit, on the 10th February 1838, Jane W. Jacobs, the mother, died. By her will dated the 6th December 1837, and duly proved, she devised all her real estate to her aunt, the plaintiff, for the term of her natural life, and the remainder therein to her three brothers, William W. Mackall, Henry C. Mackall, and

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Richard C. Mackail, who survived her, in fee. The next of kin of the said Anna Maria Jacobs on the part of the father, the said Cyrus H. Jacobs, were Thomas B. Jacobs and James Hunter Jacobs, his two surviving brothers, who conveyed their interest in the premises, after the decease of the said Jane W. Jacobs, to Commodore Jesse D. Elliott, who conveyed the same to William Darlington, Esq., who conveyed the same to the defendant now in possession.

The question for the opinion of the court is, whether the plaintiff is entitled to recover any, and if any, what part of the tract in dispute. If the court shall be of opinion that the plaintiff is entitled to recover the whole, or any part of the premises, then judgment to be entered for him for whatever he may be entitled to recover, with costs. If the opinion of the court shall be, that the plaintiff is not entitled to any interest in the premises, then judgment to be entered for the defendant, with costs.

The court below gave judgment for the defendant.

Errors assigned:

1. The court erred in rendering judgment for the defendant.
2. The plaintiff, according to the facts stated, was entitled to an undivided moiety of the land described in the writ.

Lewis and Mallery, for the plaintiff in error, referred to *Simpson v. Kelso*, (8 Watts 252); *Act of 8th April 1836*, sects. 6, 11; *Clepper v. Livergood*, (5 Watts 113); 2 *Black. Com.* 212; *Litt.*, sect. 3; *Co. Litt.* 10 b, 11 a; 3 *Rep.* 406; 1 *Vent.* 414; *Hale's C. L.* 323.

Meredith and Darlington, contra, cited *Shippen v. Izard*, (1 *Serg. & Rawle* 222); *Lit.*, sect. 4; 4 *Kent's Com.* 404; 2 *Rep.* 29; *Baker v. Chalfant*, (5 *Whart.* 477).

The opinion of the Court was delivered by

HUSTON, J. — The case stated presents these facts. The lands in question descended from Cyrus Jacobs to his two daughters, Lucy and Anna, subject to their mother's dower. Lucy died in November 1836, an infant without issue or husband. In February 1837 Anna also died unmarried and without issue and intestate; and in February 1838 their mother died. Before her death she devised her real estate to her aunt, Sally Maffit, the plaintiff, for life, remainder to her three brothers in fee. When Mr Jacobs died, his lands descended to his daughters subject to a dower to their mother: so far it came on the part of, or descended from the father. When Lucy died her share descended to and vested in her sister Anna. *Intest. Law*, sect. 5. On the death of Anna her estate vested in her mother for life, at least, or by the 11th section, in her in fee, unless her right is affected by the 9th section. The 5th section is in these words: "In default of issue and brothers and sisters of the whole blood and their descendants as aforesaid,

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and subject to the estates and interests hereinbefore given to the widow or surviving husband, if any, the real estate shall go to and be vested in the father or mother of the intestate, or if both be living at the time of his death, in the father and mother for such estate as the said intestate had therein."

In order to understand the construction of the 9th section, I must here state that by the 6th section, in default of brothers and sisters of the whole blood and of father and mother, the estate "shall descend to and be vested in the brothers and sisters of the half blood of the intestate and their issue in like manner respectively as is hereinbefore provided for the cases of brothers and sisters of the whole blood and their issue." The 7th section is: "In default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the next of kin to such intestate." Section 8. "Provided that there shall be no representation admitted amongst collaterals after brothers' and sisters' children;" and then comes the next proviso. Section 9. "Provided also that no person who is not of the blood of the ancestors or other relations from whom any real estate descended, or by whom it was given or devised to the intestate, shall in *any of the cases before-mentioned* take any estate of inheritance therein, but such real estate subject to such life-estates as may be in existence by virtue of this Act, shall pass to and vest in such other persons as would be entitled by this Act if the persons not of the blood of such ancestor or other relation had never existed or were dead at the decease of the intestate."

In the discussion of this case some censure was cast on the framers of this law, because the expression "came or descended on the part of the father or descended on the part of the mother," was dropped, and the words "ancestors or other relations from whom any real estate descended or by whom it was given or devised to the intestate," were used. Perhaps this was not censurable. Those words are copied from the 11th section of the former Act; and in that Act were evidently intended to have precisely the same meaning as "came or descended on the part of father or mother." Perhaps the words, "no person who is *not of the blood of the ancestor or other relation*," &c. are a clue to the true construction; and with that and the construction put on the words "descended on the part of," as having precisely the same meaning as the words used in this Act, I proceed to consider this case.

On the failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the first purchaser; 2 *Chitt. Black.* 177; and he defines "first purchaser" to be he who first acquired the estate to his family, whether the same was transferred to him by sale or gift, or by any other method *except that of descent*. After some difficulties which occurred in former times, are disposed of, he proceeds: "When an estate hath really descended in the course

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of inheritance to the person last seised, the strict rule of the feudal law is still observed, and none are admitted but the heirs of those through whom the inheritance hath passed; for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed;" and he concludes this head, "that he who would have been heir to the father of the deceased (and of course to the mother or any other real or supposed purchasing ancestor) shall also be heir to the son; a maxim that will hold universally, except in the case of a brother or sister of the half blood; which exception (as appears afterwards) depends on very special circumstances." Mr Chitty, in his note, shows that if a man hold one estate on the part of the father and another estate on the part of his mother, these will go to different persons. It would be time misspent to enter on a discussion or repetition of all the rules of descent. Blackstone and Hale's Hist. of Com. Law, and some later treatises have gone fully into it. The only difficulty has arisen from not attending to the point at which we must set out. We have not here to do with an estate purchased by the intestate. Half descended directly from her father. Her sister could not by any rule be called the first purchaser or perquisitor; for by the rule what came by descent is not of the kind of estate which makes a perquisitor. We must go then a step back and inquire who would have been the heir of Lucy if she had been an only child.

The maxim that he who is to inherit an estate which descended to the intestate, must be also heir to him from whom it descended, it will be seen, cannot apply to property purchased by the intestate, but only to property which he held by descent. The case of *Burr v. Sim*, (1 *Whart.* 252), appeared to me, at first, as creating some difficulty. George Craig directed two houses to be sold by his executors and the price given to trustees to educate his only son, and on his coming of age to pay the principal and interest to the son. The houses were not sold. The son came of age and devised one of the houses in fee and the other for life, and after the death of tenant for life, a question was made whether it went to the heirs on the part of the father or on the part of the mother. It was held the son took it as purchaser (perquisitor), it having been devised to him as money, and his election to take as land in the nature of a purchase: and it went to the nearest of kin, without regard to whether on part of father or mother. This was supposed to follow from the cases of *Allison v. Wilson* and *Morrow v. Brenizer*, in which it was held the property was converted into money instantly on the death of the testator, and before any sale by the executors. It was not mentioned by the counsel nor noticed by the court that the son, to whom it was given absolutely, might possibly have claimed as heir, being the worthier title; and probably did consider himself so entitled. This was followed by *Simpson v. Kelso*, (8 *Watts* 252), and they decide that a child, where land is directed to be sold, and who on coming of age elects to take this

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land and does take it, is to be considered as acquiring it by purchase, and not by devise or descent; but it has not yet been decided that a child taking purely by descent can be considered as a first purchaser or perquisitor; and we do not decide so. The profession, and, I believe, the members of this court consider the two last cases as having gone far enough; and this, as I understand the case, is the decision of this court in *Baker v. Chalfant*, (5 *Whart.* 480), where those of the blood of the ancestor recovered a moiety of the tract descended and other heirs the other lands. I shall not enter into the propriety or correctness of the feeling, which inclines in favour of that stock of ancestors whose labour or industry acquired any property, in preference to another stock who in no way contributed to its acquisition. The law seems to me to have settled the matter, and I feel neither inclination nor authority to change it.

Judgment affirmed.

Moore against Somerset.

If a note falls due on a Friday and notice of non-payment is not received by the endorser till Monday following, it would be too late if the parties lived in the same town: but an affidavit of defence must in such case state the residence of the maker, so that it may appear notice could have been regularly received in a shorter time after demand there of payment.

In a suit against the endorser of a note, he must set out affirmatively in his affidavit of defence sufficient to show negligence in the plaintiff in not giving him due notice.

The endorser is bound to know the residence of the maker of a note, and in his affidavit of defence must state at least his belief in regard to it, and that he would be able to prove it to the satisfaction of a jury.

The defendant in his affidavit of defence must swear to facts: presumptions in his favour will not supply the want of them.

ERROR to the District Court for the city and county of *Philadelphia*, in which Somerset brought suit against Mordecai Moore on the following note, a copy of which was filed:

Philadelphia, April 12, 1841.

\$336. One year after date I promise to pay M. Moore, Jun. or order three hundred and thirty-six dollars, for value received.

(Signed) JACOB KECK.

(Endorsed) MORD. MOORE, JUN.

The defendant filed the following affidavit of defence:

Mordecai Moore, Jun., the above defendant, being duly affirmed according to law, affirmeth and saith that the note in question on

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which this suit is brought, fell due on Friday the 15th April last; and deponent, who is an endorser on the said note, received no notice of the non-payment of said note until Monday or Tuesday in the following week. Deponent cannot positively say whether the notice was given on Monday or Tuesday; but he thinks and believes that it was on the Tuesday. Said notice was brought to deponent through the post-office, and has been mislaid by him. Deponent also says that he keeps tavern in Spring Garden street, between Seventh and Eighth streets, and has resided in Philadelphia for the last seven years, and is well known to the community. Deponent further says, that he is advised by his counsel, that in consequence of no notice of protest being legally given to him of the non-payment of the note by the drawer, deponent is discharged from liability as endorser.

The court entered judgment for want of a sufficient affidavit of defence; which was now assigned for error.

Norris, for the plaintiff in error, cited *Gurly v. Gettysburg Bank*, (7 Serg. & Rawle 324); *Stuckert v. Anderson*, (3 Whart. 119); *Smith v. The Bank of Washington*, (5 Serg. & Rawle 321); *Ireland v. Kip*, (10 Johns. 490); *Ransom v. Mack*, (2 Hill 587); *Weakly v. Bell*, (9 Watts 273).

St George Campbell, contra, referred to *Jenks v. The Doylestown Bank*, (4 Watts & Serg. 509); *Smyth v. Hawthorn*, (3 Rawle 358); *Smith v. The Bank of Washington*, (5 Serg. & Rawle 321).

PER CURIAM.—This affidavit contains an assertion of every fact necessary to constitute a defence, but one. The note in suit fell due on a Friday, and notice of non-payment was not received, certainly, till the Monday following; which would be too late, if the parties lived in the same town. But the defendant has not sworn to the residence of the drawer; and as demand of payment was to be made there, it may have been a place so remote, that notice could not be sent from it to the endorser so as to reach him in less than the time sworn to, by the regular operations of the mail. But the defendant may have been unable to swear to the place of his residence. Very well. He is bound affirmatively to make out a case of negligence, and must swear to facts enough to constitute it. If he cannot do that, he cannot swear to a defence. In this case every fact sworn to may be true, and yet the plaintiff be entitled to recover. It is said that, as the note is dated at Philadelphia, the presumption is that the drawer resided there also. But a defendant is bound to swear to facts, not presumptions. This endorser was bound to know the residence of the drawer; and ought to have stated, at least, his belief that he would be able to prove it to the satisfaction of a jury; without which his defence would be incomplete.

Judgment affirmed.

Opie against Serrill.

An agent having undertaken gratuitously to collect a note and book-account, surrendered them to the debtor, from whom he took a new note to himself for their amount: *held*, that this was an extinguishment of the original debt, and the agent was liable for its amount to his principal.

ERROR to the District Court for the city and county of *Philadelphia*, in which an action of *assumpsit* for goods sold and delivered was brought to December term 1840, by Pearson Serrill, William H. Bernard and Christian W. Hahn, late trading under the firm of Serrill, Bernard & Co. against Peter V. Opie, surviving partner of Edward Innis & Peter V. Opie, late trading under the firm of Innis & Opie. The plaintiffs gave in evidence a book-account against the defendants for \$293.23.

The defendant offered in evidence under a notice of special matter the plaintiffs' answer to a bill of discovery in the District Court for the city and county of Philadelphia, filed by the defendant on the 28th January 1842. The plaintiffs objected to the admission of it as incompetent, and the court sustained the objection and sealed an exception.

The following is the answer referred to:

That for some time previous to the 1st January 1840 there had been mutual dealings between the plaintiffs and the defendants, and that on the 1st January 1840 there was a balance of account due and unpaid from defendant to plaintiffs of \$248.42. That on or about the 3d January 1840 William H. Bernard, one of the plaintiffs, called on the defendant Opie, and requested a settlement and payment of the above balance; that in part payment thereof, Opie offered to Bernard a promissory note dated August 20th 1838, payable nine months after date, made by one William W. Meredith, of Nashville, Tennessee, in favour of the late firm of Innis & Opie, for the sum of \$310.82, against which Opie stated to Bernard there was a credit of \$100 for cash paid. Opie also offered to transfer to Bernard, in part payment as aforesaid, a certain book-account against Meredith, amounting to the sum of \$12, and Opie requested Bernard to take the note and book-account in part payment of the balance of \$248.42. That Bernard refused to take the note and book-account, or either of them, in part or whole payment, nor did he then, nor have the firm of Serrill, Bernard & Co., or either of them, at any time since, received from Opie, or from any person or persons on his behalf, the said note and book-account, or either of them, in whole or partial payment of the balance. That after Bernard had refused to receive

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the note and book-account in payment, Opie requested Bernard to receive the same for collection on the behalf of him, Opie, and to transmit the same to Christian W. Hahn, one of the plaintiffs, who was then at Nashville, Tennessee, engaged in collecting the claims and attending to the business of the firm of Serrill, Bernard & Co. That Bernard, solely to oblige Opie, and without any reward, recompense or commission whatever therefor, agreed so to receive, and received the note and book-account from Opie, and gave a receipt therefor in the following words:

“Received January 3, 1840, of Innis & Opie, William W. Meredith’s note, dated August 20th 1838, for \$310.82, at nine months, for collection.

(Signed) SERRILL, BERNARD & Co.”

and promised that the plaintiffs would endeavour to collect the same, according to the request of Opie. That the plaintiffs did not agree to receive the note and book-account in whole or partial payment of their claim. That shortly afterwards the plaintiffs sent the note and book-account to Hahn, who was then at Nashville, Tennessee, with instructions to demand payment of, and endeavour to collect the same from Meredith.

That at the time when the note and book-account came to hand at Nashville, Meredith was absent from that place; that shortly afterwards Hahn met Meredith at New Orleans, and demanded of him payment of the note and book-account; that Meredith declared himself unable to pay the same at that time; and Hahn believing it impossible to collect the same at that time, and in the exercise of his best judgment, agreed to take from Meredith his new promissory note, at four months, including the book account and the old note, and deducting the payment endorsed on the said old note, as the best arrangement that could be made under the circumstances. That accordingly Hahn took from Meredith a new promissory note, made by Meredith, payable four months after date to the order of Serrill, Bernard & Co., the plaintiffs, for the sum of \$232.60, being the amount due, with interest, on the said note and book-account, which had been transferred to the plaintiffs for collection. That at the time the new note was so taken, Hahn surrendered and delivered up to Meredith the promissory note payable to the late firm of Innis & Opie, and transferred by Opie to Bernard for collection. That Hahn left the new note at Nashville, Tennessee, for collection, and that it was with this view that he had it drawn payable to the order of Serrill, Bernard & Co.

And these respondents say, that throughout all these proceedings they considered themselves as acting merely as the agents of the firm of Innis & Opie, and that they are now ready and willing to pay over to Opie the amount of the new promissory note, whenever it shall be collected by due course of law or otherwise, but

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that up to the date hereof, neither the said amount, nor any part thereof, has been received from Meredith, or from any one on his behalf, by these respondents, or by any one to their or either of their use. That the new note so taken was protested at maturity for non-payment. That Meredith, as the respondents believe, failed in business, after Hahn had procured from him the new promissory note, and before it became due and payable. That Meredith, as respondents have been informed and believe, has made an assignment of all his estate for the benefit of his creditors, in which assignment neither these respondents, nor either of them, nor any one on their behalf, are preferred for the amount of the new promissory note or any part thereof. And the respondents admit that Innis & Opie were the holders of a certain promissory note dated August 20, 1838, for the sum of \$310.80, made by Meredith, then, as the respondents believe, a resident of Nashville, Tennessee, and the respondents do not know of any other promissory note, of any other date, or of any other amount of Meredith, held by the late firm of Innis & Opie. That they were informed by Opie that a payment of \$100 had been made on account of said note, but whether it was made on the 22d August, or on what other day or year, or whether a credit for said sum was endorsed on said note, the respondents do not recollect.

That in addition to the note, Opie, at the time aforesaid, averred that Meredith was indebted to the late firm of Innis & Opie, in the sum of \$12 on book-account, but whether Meredith was so indebted or not, the respondents do not know, except so far as it may be inferred from the conduct of Meredith. That Bernard did not, on or about the 3d January 1840, or at any other time or date, in any other year, ask for and obtain from Opie, or from any other person or persons on his behalf, the transfer by endorsement or otherwise, of the note and book-account against Meredith; and that Bernard did not then, or at any other time, state to Opie that Meredith was good for the amount due on the note and book-account, or for any other sum, or that the same would be received by the respondents, either in full or on account and in part payment of their demand against Opie, as surviving partner of the late firm of Innis & Opie. That the demand for which Opie, as surviving partner of the late firm of Innis & Opie, is now sued, is for a balance of book-account, amounting to \$248.42 due by the said firm to the respondents, and the same which was due on or about the 3d January 1840. That Bernard, on the endorsement and transfer of the note and book-account to Serrill, Bernard & Co. for collection, sent the note to Hahn, one of the firm of Serrill, Bernard & Co., who was then in Nashville, Tennessee, for the purpose of collection. That Meredith not being in the city of Nashville, and not being able to pay the note and book-account, Hahn, using his best discretion in the premises, and in accordance, as he believed, with the best interests of the firm of Innis & Opie,

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having met Meredith in New Orleans, took from Meredith his new promissory note for the sum of \$232.60, payable in four months after date to the order of Serrill, Bernard & Co., the respondents; the date of said note, and its precise words, the respondents are not able to state, as the note is now at Nashville, Tennessee, in the hands of the agent or attorney of the respondents for collection; that the new note was taken without an express authority or consent, in so many words, from the complainant, but as the respondents believe and understood, with the implied authority and consent of the complainant, in the exercise of a wholesome discretion in a matter undertaken by them without reward, and solely on the responsibility of the complainant. That Hahn, at the time of taking the new promissory note, delivered up Meredith the old note and book-account. That Opie has not been deprived of his means of recovering his demand from Meredith, as the new note includes the book-account, as well as the balance on the old note; that the respondents hold themselves liable, under their agreement, to Opie, for whatever may be collected therefrom, and are willing at any time to direct their agent to hold the said note to the order of Opie. And the respondents deny that Bernard ever averred to Opie that the amount due on the note and book-account had been secured from Meredith, by the respondents to themselves or to any one on their behalf, and that the same had already been or would be paid. And the respondents admit that Meredith failed in business after the new promissory note was made, and before it became due, and that it was protested for non-payment. That they have been informed, and believe, that Meredith executed an assignment of all his estate for the benefit of his creditors; that they are not informed whether Opie is preferred as a creditor therein or not; that the respondents are not preferred therein for the amount of the new promissory note, or for any other amount; that they still retain in their possession, under their control, the new promissory note for collection; that they have endeavoured to enforce payment of the same, but without success," &c. &c.

Error assigned :

The court erred in deciding that the defendant was not entitled under the pleas and notice of special matter to give in evidence the answer filed by the plaintiffs to his bill of discovery.

Hieskell, for the plaintiff in error. The question is whether the defence appearing on the face of the plaintiff's answer, is not a good one, and admissible under the defendant's notice of special matter. We contend that the plaintiffs, being agents to collect, by taking a new note in their own name, made the debt their own. It was decided in *Floyd v. Day*, (3 Mass. 403), where an attorney in payment of a debt received the note of a third person endorsed over to himself, that he was not liable to the principal in trover for the note, but the proper action against him was *assumpsit*, to

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recover the money. The only difference here is, that the plaintiffs took a new note, payable to themselves, giving further time, and surrendered up the old note and account; which is not important.

P. Morris and *M'Call*, contra, insisted that the plaintiffs acted in the character of mandatory for the convenience of the defendants, and their undertaking being gratuitous, they were only liable in case of gross negligence, which it was incumbent on the defendants to show. But neither the notice of special matter nor the answer showed that the plaintiffs could have done better by any other course, or that any loss was occasioned by it. *Tompkins v. Saltmarsh*, (14 Serg. & Rawle 275); *Beardslee v. Richardson*, (11 Wend. 25); *Shiells v. Blackburne*, (1 H. Black. 161); 5 Day 29. The new note might be endorsed by us over to the defendants, and is as good as if taken to them. The plaintiffs never refused to deliver it over to them. If the plaintiffs are responsible, it is only for unliquidated damages for misfeasance as agent, which is not the subject of defalcation as it sounds in tort. *Nickle v. Baldwin*, (4 Watts & Serg. 290). All the actions against a mandatory are special actions on the case, not *assumpsit*, unless where the money has been received. In *Floyd v. Day*, the agent executed a release of the debt, which was not done here. The plaintiffs received and held the new note as trustees for the defendants, and the answer, which is conclusive, states they took it as agents of the defendants.

Hieskell, in reply. It makes no difference that the agency was voluntary and gratuitous or for the benefit of the defendants. The agent is bound to his express undertaking. *Jones on Bailm.* 47, note E.

The opinion of the Court was delivered by

SERGEANT, J.—This was an action of *assumpsit* for goods sold and delivered. The original debt was not denied, but the defendant alleged that the plaintiffs received from him on account certain claims against a third person in Nashville, Tennessee, consisting of a note to the defendants, then due, and a book-account for a small sum, transferred to the plaintiffs, both of which were received by the plaintiffs for collection; that afterwards the plaintiffs took from the debtor at New Orleans a new note at four months for the whole amount due from him, made payable to the order of the plaintiffs, and thereupon delivered up to him the original note and book-account. To prove these facts, he offered in evidence the plaintiffs' answer to a bill of discovery, but the court rejected it. We are of opinion that the evidence ought to have been received. In itself, the answer, with the bill, was evidence to go to the jury, and there is nothing in the answer which takes away the defence, though the whole of the answer be, as it is

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contended it ought to be, taken together. It is alleged that the undertaking to collect was gratuitous, and therefore the plaintiffs, as agent, were only liable for gross negligence. It is not necessary to examine the law on this head, because whenever an agency is assumed, whether gratuitous or not, the parties are bound by the terms agreed upon between them. *Jones on Bailm.* 101, 114, 115, 116; *Story on Bailm.* 137. An agent undertaking to collect a debt placed in his hands, who releases it and takes from the debtor a new note to himself, does, in law, receive payment of the debt, and is at once liable to the principal as if he had received the money. In *Floyd v. Day*, (3 Mass. 403), an attorney employed to collect a demand, compromised it by receiving a note, (part of which had been paid), specially endorsed to himself; and in an action of trover for the note brought against him, the court say, that when the defendant instead of money received this note, and discharged the debtor, the property of the note was in the defendant, and he became immediately answerable to the plaintiff for the amount of the liquidated damages, which made part of the consideration of the principal, and an action of *assumpsit* was the proper remedy. He must be considered as having made himself liable for the money he ought to have received. In the case before us, the plaintiffs released and extinguished the original debt by a surrender of the note and book-account, and the taking a new note was as much a payment of it, as regards the defendant, as if the plaintiffs had received the money. Having collected the debt, therefore, they must be responsible for it.

Judgment reversed, and a *venire facias de novo* awarded.

The Mayor against Davis.

The Act of 12th February 1795, authorizing the extension of the market in High street, Philadelphia, is not repealed by subsequent laws, and therefore under its 4th section the city corporation had a right to pass an ordinance prohibiting the sale of beef in the western moiety of the market-house between Seventh and Eighth streets.

In construing penal statutes, the words descriptive of an offence or its punishment are not to be bent on the one side or on the other; and statutes *in pari materia* are to be construed together, and the legislative meaning of words followed.

ERROR to the Common Pleas of the county of *Philadelphia*.

This was an action of debt, instituted before the mayor of the city of Philadelphia, to recover the penalty of six dollars, for an alleged violation of an ordinance of the city, passed 28th May

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1835, entitled "A supplement to an ordinance relating to markets." The said ordinance is as follows: "That from and after the passing of this ordinance, the penalty imposed upon any person or persons for selling beef in the western moieties of the market-houses in High street, west of Delaware Fourth street, shall be six dollars, recoverable with costs, according to law; and that so much of any ordinance as is inconsistent with the provisions of this ordinance be, and the same is hereby repealed."

The mayor rendered judgment for the plaintiffs, and the defendant appealed to the Common Pleas, where the following case was stated for the opinion of the court in the nature of a special verdict, with liberty for either party to take a writ of error.

The defendant is a farmer, residing in Chester county Pennsylvania, where he cultivates a large farm of over 300 acres of land, nearly the whole of which is in grass, and he is the renter from the plaintiffs at an annual rent of \$20, of a farmer's stall in the western moiety of the High street market between Delaware Seventh and Eighth streets in the city of Philadelphia. On the 16th day of September 1843, he sold beef from his said stall. It is agreed that the bullock in question, the meat of which the defendant then exposed for sale, was not calved on the defendant's farm, but was purchased by him in Chester county 13 months ago, in a poor and lean condition, and then totally unfit to be slaughtered for the market; that the defendant did, from the time of his purchase of the said bullock, keep, feed and fatten him on his said farm and on the produce of his said farm, until the 15th day of September 1843, when he was slaughtered by the defendant on his said farm, being then in a fat condition; that the defendant then brought the meat in question to the city and sold it from his said stall as a part of the produce of his said farm.

If the court shall be of opinion that the ordinance of the city of Philadelphia of the 28th May 1835, entitled "A supplement to an ordinance relating to markets," is legal and constitutional, and that the defendant has violated the law of the land in selling the beef, then judgment to be entered against him for six dollars, the penalty and costs; if otherwise, then judgment to be entered for the defendant.

The following are the Acts of Assembly referred to in this case:

Act of March 23, 1786. — An act to empower the wardens of the city of Philadelphia to extend the market-houses in High street, from Third street to Fourth street, from Delaware river, and to continue the same from time to time westwardly, from one street to another, in the middle of High street, as the wardens of the said city shall think necessary, and for other purposes therein mentioned. 2 Smith 272.

Whereas the inhabitants of the city of Philadelphia and the counties bordering thereon, have represented to this house the

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necessity there is of extending the market-house in High street, westward, in the city of Philadelphia, that the old market-house was become by far too small for the accommodation of the people from the different parts of the country, who are often exposed to the inclemency of the weather, without shelter, in rain or snow, to the great danger of their health, and inconveniency of the inhabitants of the said city, and that custom and long usage have fixed High street as the most eligible and central place for the market-house to be continued.

2. That from and after the passing of this Act, it shall and may be lawful to and for the [wardens] of the city of Philadelphia, or a majority of them, and they are hereby enjoined and required to contract for materials, and employ workmen to build and extend the market-house in High street, along the middle thereof, from Third street to Fourth street, within the present or the next succeeding year, and so on from time to time, as necessity or occasion shall require, to extend the market-house in High street, from street to street, westward, as often as the [wardens] of the said city, or a majority of them, shall think proper, for the benefit and advantage of the inhabitants of the said city, and for the accommodation of the country people bringing provisions to market for sale.

3. And in order to afford a convenient opportunity for the turning of wagons and other carriages, Be it further enacted, That the first shambles or market-house, as it shall or may be extended in all or any of the said High street, shall not approach or be continued nearer than 30 feet to the line or lines of any of the streets crossing the aforesaid High street.

4. And in order that those who attend the said market with herbage and vegetables, may be accommodated with a more convenient shelter under the eaves thereof, as well as to afford a wider space for the passage of carriages, Be it further enacted, That the width or breadth of the said shambles or market-house shall not be more than 18 feet, from the outside of any one pier or column thereof to the outside of any other pier or column of and opposite to the same; and that the roof of the said shambles or market-house shall have the same elevation and projection with that already erected, and no more.

8. When the market-house shall be finished and completed, the one-half of the building so erected, shall be and remain free for the country people attending the said market for ever, and that no fees, tolls or perquisites, be demanded or exacted from them for the use thereof. And the wardens of the city of Philadelphia are authorized to let or demise the stalls which they may erect in the other half of the said building, to any person or persons, for such yearly rents and reservations as shall be agreed upon; and the rent arising from such stalls shall be paid to the treasurer of the

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wardens of the city of Philadelphia, for the time being, for the use of the said city, and for no other purpose whatsoever.

Act of February 12, 1795.—A supplement to the Act, entitled, “An Act to empower the wardens of the city of Philadelphia, to extend the market-house in High street, from Third street to Fourth street, from Delaware river, and to continue the same from time to time westwardly, from one street to another, in the middle of High street, as the wardens of the said city shall think necessary, and for other purposes therein mentioned.” 3 *Smith* 197.

Whereas, by an Act passed the 23d March 1786, it was enacted, That when the market-house in the city of Philadelphia, in and by the said Act directed to be built, should be finished and completed, one-half of the said buildings should be and remain free for the country people attending the said market for ever: And whereas the mayor, &c. of Philadelphia, by an ordinance made on the 8th day of June 1789, did, in pursuance of the views of the Legislature, ordain that the western moiety of the said market-house should be for the use of the inhabitants of the country, as provided for by the Act of Assembly above-mentioned: And whereas the intentions of the Legislature appear likely to be frustrated, by the intrusion of persons of a different description from those originally intended to be thus provided for:

1. *Be it enacted*, That from and after the passing of this Act, it shall not be lawful for any person whatever, to sell any beef in the western moiety of the market-house or shambles in High street, between Third street and Fourth street, in the city of Philadelphia; nor for any person exercising the trade of a butcher or victualler, to occupy any stall or sell any meat of any kind, within the said western moiety of the market-house or shambles aforesaid.

2. The mayor, &c., of Philadelphia shall have power to make and enforce such by-laws, rules and ordinances, as may be found expedient for the purpose of carrying this Act into execution, conformably to the true intent and meaning thereof.

3. The mayor, &c., of Philadelphia, in common council assembled, are hereby authorized to assess, levy and collect, from the inhabitants of the said city, and upon all estates real and personal and taxables, within the same, such sum or sums of money as they may deem necessary, to enable them to extend the market in High street, whenever they may think proper so to do; which taxes shall be levied and collected in the same manner as the city taxes are.

4. When the market shall be so extended, one-half of the buildings erected shall be and remain free for the country people bringing the produce of their farms to market, for ever, and agreeable to what is directed by the first section of this Act; and that no fees, tolls or perquisites be demanded or exacted from them, for the use thereof.

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Act of March 19, 1804. — An Act to authorize the select and common councils of the city of Philadelphia, to erect market-houses in the said city. 4 *Smith* 165.

1. From and after the 1st day of November next, it shall and may be lawful for the select and common councils of the city of Philadelphia, to cause a market-house or market-houses to be erected, at such place or places within the said city, as to them may appear most conducive to the interest and convenience of the citizens thereof, and others who may have occasion to use the same; and to make such regulations for the government of the said market, as to them shall appear useful and necessary, and not inconsistent with the existing laws of this Commonwealth; *Provided*, that one-half of the buildings so erected, shall be and remain free for the use of the country people attending the said market, and that no fees, tolls or perquisites shall be demanded or exacted from them, for the use thereof.

Act of March 19, 1810. — An additional supplement to the Act, entitled, "An Act to empower the wardens of the city of Philadelphia, to extend the market-house in High street." 5 *Smith* 118.

1. It shall and may be lawful for the corporation of the city of Philadelphia, when, and as often as they shall think proper, to extend the market-house in High street or elsewhere, in the said city, to build a market-house or houses, to let or demise the one-half of the stalls which they may erect to such persons from the country, as send or carry the produce of their farms to the said market, and to no others, and to let the other half of the stalls so erected, at their own discretion, to such person or persons, butchers or victuallers, as to them it may seem proper; any law, usage or custom to the contrary notwithstanding.

2. Whenever the market-houses in High street shall be extended, it shall not be lawful for any *victualler* to sell any beef in the western moiety of any market-house or shambles that may be erected at any time hereafter in High street; but the western moiety shall be let to such persons from the country who send or carry the produce of their farms to market, and to no others; and the one-half of the stalls that may be erected elsewhere, shall also be let to such persons from the country, who send or carry the produce of their farms to market, and to no others: *Provided*, that the annual rent so to be charged and received, shall not exceed \$20 per stall.

The court, after argument, rendered judgment for the defendant, which was now assigned for error.

Olmsted, for the plaintiff in error. The only question is, whether an ordinance of the city preventing the sale of beef in the western moiety of this market, is within the authority given by the legislative Acts on the subject. The charter of William Penn

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authorized a market, and clerks to be appointed. After the revolution a charter was given to the city by Act of Assembly, but it contained nothing on the subject of building markets. Shortly after, the Act of 1786 was passed, authorizing the extension of the market-house from Third to Fourth street, and so on from time to time as necessity or occasion required. By the 8th section of this Act, the one-half of the market-house was to be free to the country people, and the other half to be let for the use of the city. In 1795, however, another Act was passed, which prohibits the sale of beef in the western moiety of this market from Third to Fourth street, by the express words of the 1st section, by any person whatever, butcher or other person. The 3d section gives the right to extend the market further, and by the 4th section the provisions of the 1st section are extended to all such future markets to be built. The market now in question being beyond Fourth street, is one extended since, and therefore falls within the same regulations as the market from Third to Fourth street. The words of the 4th section are, that one-half shall be and remain free for the country people bringing the produce of their farms to market, agreeably to what is directed by the 1st section. On this Act there could not be a doubt; but the doubt is raised by the Act of 19th March 1810; for that of 1804 is only to authorize markets in other places than High street. Now the Act of 19th March 1810 does not repeal that of 1795 expressly, nor by any necessary implication, but is perfectly consistent with it. Its great object was to give the farmer an exclusive right to a stall, by taking a lease of it and paying a rent, so as to exclude intruders, hucksters and others, who had begun to deprive him of the stalls by prior occupation. Some slept on the stall for that purpose, and held it by continual possession. The Act directs, therefore, that the stalls shall be let only to those who send or carry their produce from the country. It limits the rent to \$20, and confines the sale of beef by the victualler to the eastern moiety of the market. All this goes to show, that instead of repealing the provisions of the Act of 1795, the Legislature meant to continue them, as they had been found advantageous both to the butchers and the country people, and the city derived a much larger rent from the butcher to enable it to pay the expense of building and keeping up the market, of maintaining clerks of the market, of cleaning and lighting the market-houses, and other expenses. It is clear, that produce of the farm did not include beef, under the Act of 1795; why, then, should it under the Act of 1810? The rule is well settled, that different statutes *in pari materia* are to be construed together, and the same word to receive the same construction in all. This is the rule in construing bankrupt laws, poor laws, and all others. *Rex v. Loxdale*, (1 Burr. 447). And the use of the words, "produce of the farm," in the Act of 1795, is borne out by correct grammatical construction; for beef is an article manufactured

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from the produce of the farm by those who exercise what the Act of 1795 calls, "the trade of a butcher or victualler." The present question is not between the butchers and the farmers, as is commonly supposed; it is a question merely affecting the city's right to a revenue from the markets.

Lewis and Norris, contra. This is a mere question between the butchers and the farmers. The former desire a monopoly—to compel the farmer to sell to them, and then charge the citizen. The butcher's trade requires no skill, and even in England would not come within the apprentice laws. The streets being public highways, the city has no power to erect or regulate markets, except what is given by the Legislature; *Commonwealth v. Passmore*, (1 Serg. & Rawle 221); *Rung v. Shoneberger*, (2 Watts 25); *Philad. and Trenton Railroad Co.*, (6 Whart. 44); and the authority to prevent farmers from selling beef in the western moiety of this market, is not given by the Acts of Assembly. The Act of 1795 was not intended to alter the free and full right given by the Act of 1786. The preamble recites that the franchise of the country people had been intruded upon, and its object was to secure, but not to restrict them. There was little or no beef raised in the adjoining counties in 1795; and that was not in view. Since the year 1802 these counties have become grazing counties, and the feeding and fattening of cattle are an important item of agriculture; and the object of the Act of 1810 was to secure the farmers against the shiners who intruded upon them. The intention of the Legislature is to be ascertained from the necessity under which the Act was made. 15 *Johns.* 380; 1 *Wheat.* 115. A penal statute is to be construed strictly, and not extended by construction, and there is no prohibition in the Act of 1810 as to any market beyond Fourth street. The Act of 6th April 1802, (3 *Sm. L.* 530), is also an important Act, and to be considered in determining this question. It enacts, that from and after the passing of this Act, it shall and may be lawful for any person or persons to sell or expose to sale provisions, vegetables or fruit in the markets of any city, borough, or corporate town within this Commonwealth, provided such provisions, vegetables or fruit shall not have been previously purchased within the limits of such city, borough or corporate town; any law to the contrary notwithstanding. And in the word "provisions," beef is certainly included, being the most important. Again: the Act of 1804 expressly makes markets to be thereafter built, free for the use of the country people attending them: and to the same effect is the Act of 1810, under which the market now in question was built. The western moiety is to be let to such persons from the country who send or carry the produce of their farms to market, and to no others; whilst the butchers are prohibited from selling beef there. It is a common law right to sell and buy where you can find a market, and grants

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to corporations are construed strictly. 2 Cow. 420; 4 Cow. 144; Cowp. 29; 15 E. C. L. 37. Produce is that which the legitimate proceeds of farming yield. This includes the purchasing and grazing of cattle.

Dallas, in reply, insisted that the interest of the great body of the farmers was promoted by this ordinance, however a few colourable farmers might think otherwise. The main question, however, is, whether the Act of 1795, the enactments of which are precise and clear on the subject, is repealed by any subsequent legislation. It is incumbent on the party alleging this to show that it is so by express words or necessary implication. The object of the Act of 6th April 1802, is only to secure to the country people the common law freedom of markets in any town or place in Pennsylvania: but it does not extend to the market-house, which was built by the city of Philadelphia as its own, and at its own expense, and over which the control is given to them. The markets are far beyond the market-houses: the one belongs to the State and its citizens, the other to the corporation. If the Act of 1802 is applied in all its extent, it sets aside the whole system of the city market-houses. No clerks could inspect, no corrupt or unwholesome provisions could be expelled. As to the Act of 1810, it is evidently for the protection of the country people, by keeping out intruders, and extends their privileges, by enabling them not only to come, but to send a person to market. Independently of the Act of 1795, will it be pretended that they could bring every kind of produce to the market-house? Could they bring there and place on the stalls manure, or hay, or wood, or charcoal, under the name of produce? And is there no power to regulate the general right, by fixing the time, place and manner of conducting the market? Beef is not the produce of a farm, any more than hats, or shoes, or shirts made from the raw article? A farm is defined to be cultivated ground, and the produce is that which grows from it. Beef is defined to be the flesh of black cattle prepared for food. He who prepares and brings in such beef to market becomes a butcher, and subject to all that attaches to that character. A bullock not raised on the farm, but bought, is not the produce of the farm. He may have grazed from time to time in several, and which one can lay claim to him as its produce?

The opinion of the Court was delivered by

GIBSON, C. J. — So far as statutes for the regulation of trade impose fines or create forfeitures, they are doubtless to be construed strictly as penal, and not liberally as remedial laws. Of this stamp are revenue laws, and laws for the registry of ships, as was held in *Hubbard v. Johnston*, (3 Taunt. 377), and of the same stamp is at least one of the laws for the regulation of this market, so far as the corporation is empowered by it to enforce obedience

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to it by the infliction of a penalty. But it cannot be maintained that a penal statute is to be construed strictly in all its parts; or that the words of it are to be narrowed in their operation, even in those parts of it which define the offence and annex the penalty. "We are to look at the words, in the first instance," said Justice BULLER, in *Rex v. Hodnett*, (1 T. R. 96), "and, where they are plain, we are to decide on them. If they are doubtful, we are to have recourse to the subject-matter." The true rule is, that words descriptive of an offence, or the punishment of it, are not to be bent to the one side or the other. The question, then, is, whether the Act of the 12th February 1795, which explicitly prohibits the sale of beef in the western moiety of every High street market-house above Third street, has been expressly or impliedly repealed, in whole or in part, by the Act of the 19th March 1810.

The Act of the 23d March 1786, which is the first member of the series, did no more than authorize the corporation to extend the market in High street, from Third to Fourth street, and still further when it should be thought necessary: but on condition that the western moiety of each market-house should be left free to the country people. The stalls in the other moiety were to be rented. This does not touch the case before us. Then came the Act of 1795, reciting that the intentions of the Legislature were likely to be frustrated by the intrusion of persons of a different description from those intended to be provided for by the preceding Act, and declaring that "it shall not be lawful for *any* person whatever to sell any *beef* in the western moiety of the market-house or shambles in High street between Third and Fourth streets; nor for any person exercising the trade of a butcher or victualler to occupy any stall or sell any meat of any kind, within the said western moiety of the market-house or shambles aforesaid." This settled the question as to the market-house then about to be built. But the Act gave the corporation the same power that was given to it before, to extend the market indefinitely to the west, expressly subject, however, to the preceding prohibition. Hence, it became unlawful to sell beef in the western moiety of any market-house on High street subsequently erected. By what statute has this prohibition been repealed?

The Act of the 6th April 1802, which is alleged to bear on it because it declares generally that any person may sell provisions in any city, borough, or corporate town, was not intended to be applied to the High street market, which had a code of its own; nor was it intended to destroy, at one fell swoop, all restrictive regulation elsewhere. Any one may doubtless sell provisions in a market-town, but only at the market-place appointed for the sale of the particular article. There certainly was no design to sanction the intrusion of their poultry and pigs into the churches or the dwellings of the inhabitants, or into any other place that would be improper for the exhibition of them. It is impossible to

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conjecture, at this day, what was the grievance intended to be redressed by it, or why a law declarative of a right so unquestionable before it, should have been thought necessary. It was probably to maintain the quarrel of a few market-people with the authorities of some incorporated village or town; but it was certainly unnecessary to back it with the august power of the Legislature. Nor does the Act of the 19th March 1804, which authorizes the corporation of Philadelphia to establish markets, with analogous regulations in other parts of the city, touch the question more nearly. We come then to the Act of the 19th March 1810, which consists of two sections containing very nearly the same provisions for the very same thing; and which consequently exhibits a lack of precision and perspicuity.

The first provides that it shall be lawful for the corporation to extend the market in High street or elsewhere, and to build market-houses; "to let or demise the one-half of the stalls they may erect, to such persons from the country as send or carry the produce of their farms to the said market, and to no others; and to let the other half of the stalls so erected, at their own discretion, to such persons, victuallers or butchers, as to them may seem proper; any law, usage or custom to the contrary notwithstanding." The concluding expletive was not thrown in to give the section a repealing tendency. It was freely used by the Legislature, at that day, to round off a period, and perhaps to jog the memory of the Judges, lest they should forget that posterior laws abrogate those which happen to be prior and contrary to them. The other section provided, that "whenever the market-house in High street shall be extended, it shall not be lawful for any *victualler* to sell beef in the western moiety of any market-house or shambles that may be erected at any time hereafter in High street; but the western moiety shall be let to such persons from the country who (as) send or carry their produce to market, and no others; and the one-half of the stalls that may be erected elsewhere, shall also be let to such persons from the country who (as) send or carry the produce of their farms to market, and no others:" provided, that the annual rent do not exceed twenty dollars the stall. From this, it is said, we must infer, that because victuallers, and they only, are expressly forbidden to sell beef in the western market, and because the stalls are required to be let to those who fetch the produce of their farms to market, the occupants were to be at liberty to use them for the sale of every thing, without exception, which happens to be the immediate or remote produce of his farm. But why was this statute enacted, and what was the mischief to be corrected by it? Certainly not to authorize the extension of the market, for that had been doubly done before. The object was simply to let the stalls. And here let me say, it is the bungling attempts of the penman to say the same thing in different words, which so frequently involves the meaning of the

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legislature in uncertainty. It is a matter of history, that the mischief which called for correction, was the confusion and jostling which occurred before their several places were assigned to the country people; and the legislature intended no more than to apply a remedy to it, by giving each a separate right to a stall. Surely the petty rent of twenty dollars was not meant to be compensation for a privilege which would put a grazier on a par with a regular victualler, who is compelled to pay much more for his stall. Why then should it be thought that because a moiety of the stalls is required to be let to the country people, they must necessarily be at liberty to use them for the sale of every thing which a farmer brings from the country? The inference attempted, is that because the stall is let to one who markets the produce of a farm, he may use it to market whatever is the produce of a farm in the largest sense. But we are called on not to put a construction on the Act of 1795, which is in some measure a penal one—for it needs no construction—but on the Act of 1810, which is asserted by the defendant himself to be remedial; and if we are to be guided by common sense applied to the context, we must suppose that there are many things which are necessarily exceptions to the general expression. Swine, horses, neat cattle, sheep, manure, cord-wood, hay, and many other things not more savoury, would be out of place in a market-house for the sale of poultry, vegetables, fruit, eggs, milk, butter, lard, and other provisions for the mouth; yet they are strictly produce of the farm: much more so, indeed, than beef, which, though it comes, like every thing else, primitively from the soil, is as much a manufactured article as leather, cloth, or charcoal. The ox is the produce of the farm; beef is the produce of the slaughter-house and the shambles. It is manufactured by the professional skill of an artisan, whose business is as distinct from that of a farmer, as is that of a flax-dresser or a wool-comber. That the farmer sometimes works up his own raw materials, cannot prevent it from taking a new denomination from the additional labour expended on it. The versatility so conspicuous in the American people, often makes him his own weaver; yet it follows not that his linsey-woolsey, though cut from his own sheep, is the less manufactured, or the less improperly denominated the produce of his farm. The blending of trades does not change the nature of the wares. When the farmer slaughters his own ox, the beef is not less the product of the slaughter-house; and this may be the reason why it was thought unnecessary to re-enact the prohibition of the preceding Act, against the sale of beef in the western parts of the market-houses, by any person, whether farmer or victualler. The three statutes which I have drawn particularly into view, being parts of a system, are to be taken together as one; for it is to be intended that the system was meant to be consistent throughout. The interpretation of statutes in *pari materia* by each other, has

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been carried so far, that it was said by Lord Mansfield, in *Rex v. Loxdale*, (1 Burr. 447), "that all which relate to the same subject, notwithstanding some of them may be expired or not noticed, must be taken to be one system, and construed consistently." But what is more to the purpose, it was ruled in *The King qui tam v. Smith*, (4 T. R. 419), that when the same word is used in statutes which are in *pari materia*, a distinction as to the sense in which it is used in the one, is a legislative exposition of the sense in which it is to be understood in the other. And in *Bacon's Abr. Title, "Statute"* I. it is said that words and phrases whose sense, in a statute, has been ascertained, are to be understood in the same sense when used in a subsequent statute. Now the phrase 'produce of a farm,' was taken, in the Act of 1795, not to include beef; and it is consequently not to include beef in the Act of 1810. As the Act of 1795 expressly gives the corporation power to enforce the prohibition by such by-laws as might be found necessary, the penalty was legally imposed, and must be recovered.

Judgment of the Common Pleas reversed, and judgment of the Mayor affirmed.

Mode's Appeal.

A sheriff's sale of land before the Act of 6th April 1830, extinguished all prior mortgages, and it was not in the power of the sheriff or purchaser or parties to keep them alive as mortgages so as to affect third persons subsequently buying, by any memorandum in the conditions of the sheriff's sale or bargain amongst themselves of which such subsequent purchaser had notice.

THIS was an appeal by Alexander Mode and Jane Johnson, Jun., from the decree of the Court of Common Pleas of Chester county, distributing money in court arising from the sale of real estate by the sheriff under writs of execution.

Samuel Eckstein was on the 9th May 1825, the owner of a paper-mill, messuage and four adjoining tracts of land in Chester county, containing about 130 acres, which on that day he mortgaged to Alexander Mode and William Mode to secure the payment of \$5000 in instalments, of which \$1000 had been since paid off, which mortgage was recorded on the 11th May 1825. In August 1825, Eckstein conveyed the premises to John Carson. On the 12th November 1825, Carson mortgaged them to Eckstein to secure the payment of \$1000. This mortgage was subsequently assigned to and was now held by Jane Johnson, Jun.

Judgment was entered in the Common Pleas of Chester county on the 26th February, 1828, in favour of Eckstein, against Carson,

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for another debt of \$2526.94, and by proceedings under it, the premises were levied on and sold by the sheriff, on the 22d June, 1829, to Anthony Kelty, for \$1795, and the sheriff's deed acknowledged on the 3d August, 1829. Neither the levy, sheriff's return, deed, nor any of the proceedings of record in the suit, alluded to these mortgages. In Kelty's written subscription to the contract of sheriff's sale, deed and sheriff's return, the consideration stated was \$1795. The appellants alleged that this sale was made subject to their mortgages, as well by the understanding and agreement of all parties, as under the conditions of sale. The third condition of sale was, "the premises are sold free and clear of all liens by judgment or execution, and subject to all legal encumbrances by mortgage, will or otherwise, created prior to the lien of the judgment on which the premises are sold." The sheriff proved the conditions, and also that they were generally the same as those under which they usually sold during the time he was in office up to that date and after for some time: but these differed from others in having the word "will" inserted in this condition. He had in his possession certificates of the mortgages above-mentioned. It was his practice to exhibit them, but he did not recollect exhibiting these. He did not read them, but mentioned he had them if any one wanted to see them. He thought the property then worth \$7000 or \$8000. His uniform practice was to read the conditions of sale, and he did not doubt they were read at this sale. Kelty proved he bought subject to the mortgages; that he knew of Mode's and Johnson's mortgages, but did not know who informed him. He bid \$1700 or \$1800 under that impression. Figures, calculated by some one on a post, showed him afterwards the amount of the mortgages and interest, and the sum he bid, but the interest was more than he expected. He paid interest to Mode on his mortgage for several years.

On the 8th May 1838, Kelty mortgaged the premises to Phelps and Spafford, of Connecticut, to secure the sum of \$5200, previously contracted for placing machinery in the mill. This mortgage was subsequently assigned to the Norwich Bank, and again by them to the Bank of Chester county.

To May Term, 1842, Mode sued out an amicable *scire facias* on the mortgage, in the Common Pleas of Chester county, against Eckstein, mortgagor, and Kelty, terre-tenant, by which it was agreed that Kelty purchased the premises expressly subject to the payment of the mortgage debt, as part of the price of the lands, and assumed the payment of the debt and interest, such being the understanding and arrangement between all the parties concerned at the sheriff's sale, and had continued to pay interest, &c., and judgment was confessed for \$4726, balance due at that date on the mortgage. To the same term an amicable *scire facias* against Carson's administratrix and Kelty, terretenant, of the same tenor and effect, was entered and judgment confessed for \$1031.16.

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To the same term, in the case of the Norwich Bank against Kelty, an amicable *scire facias* was entered and judgment confessed for \$5526.78. A *levari facias* issued on each of the above judgments, under which the real estate in question was sold and the fund in court raised.

Other liens were entered against Kelty and bound this property, viz: James Newlin's mechanic's lien, on the 19th Dec., 1837, for \$109.93; Eli Fredd's judgment, on the 13th March, 1838; Nathan Baker's judgment, Sept. 19th, 1839; Bank of Chester County, judgment, Feb. 17th, 1840; Jos. S. Lovering & Co's. mortgage, Aug. 13th, 1841; Thomas Bond's mortgage, Oct. 8th, 1841; Thomas Strode's judgment, May 6th, 1842; Norwich Bank's judgment (on bond accompanying mortgage) May 9th, 1842; Thos. Strode's judgment, May 9th, 1842. These creditors claimed the proceeds in the court below, contending that the mortgages were extinguished by the sheriff's sale in June 1829. The appellants, to repel this, called a number of witnesses to show, by conversations and declarations of the creditors and by parol proof, that these creditors had notice of the existence of the mortgages at or before the times their debts were contracted and liens obtained, and that the Chester county Bank procured the sheriff's sale in 1829, and received the money as the party interested.

The court below (BELL President) was of opinion that since the cases of *Willard v. Norris* (2 Rawle 56) and *Corporation v. Wallace* (3 Rawle 109), it was not to be questioned that by the law of Pennsylvania a judicial sale under a judgment against the owner of land made before the Act of 6th April, 1830, discharged the lien of a prior mortgage for the payment of money and turned the mortgagee round on the fund, which by operation of law was substituted for the land, whatever was the price brought or was done with the proceeds. The mortgagee was bound to look to the fund in the sheriff's hands, and if he failed to do so, could not have recourse to the land. But such purchaser might agree to buy the land subject to the mortgage, and if he did so, equity would hold him to his bargain; and he would take it *cum onere*, according to *Fickes v. Ersick* (2 Rawle 166); *Shultze v. Diehl* (2 P. R. 273); *Stackpole v. Glassford* (16 Serg. & Rawle 163); *Barnet v. Washebaugh* (Ib. 414); *Twelves v. Williams* (3 Whart. 485); *Roberts v. Williams* (5 Ib. 170); *Berger v. Hiester* (6 Ib. 210). According to these cases, one who with a full knowledge of a prior encumbrance proclaimed by the sheriff, agrees by parol to purchase subject to it, makes his bid with an eye to it and purchases accordingly, is bound by his agreement and holds the land subject to the burden. It was not necessary it should appear by the levy, conditions of sale and sheriff's deed; it was sufficient if it appeared by the conditions of sale and by the clear evidence of the purchaser and others, that he bought under the condition that his bids were made with reference to a mortgage for \$5000; and

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with his final bid of \$1795 he, as well as the bystanders, all considered he was to give \$6795 for the property, and that he had paid the interest till within two or three years before the last sale of the property. That as to subsequent encumbrancers the question was, whether they had due notice of the existence of the mortgages prior to the origin of their respective claims, and if such notice was given, their liens were subservient. The court then went into the question whether these subsequent mortgagees and judgment creditors had such notice. The conditions of sale were not constructive notice: for one looking into Kelty's title would be led to the sheriff's sale, which, for aught that appeared on record, gave him a title clear of all prior encumbrances: for the conditions of sale are not returned with the record, and make no part of it, and he was not bound to inquire further. These mortgages, therefore, stood as unrecorded mortgages, giving a lien against the land in the hands of the purchaser and against all others with notice. As then there was no constructive notice, the court inquired whether there was evidence of actual notice to the posterior encumbrancers of the fact that Kelty held subject to Mode's and Johnson's mortgages. After examining the testimony of the witnesses, whose depositions had been taken, the court thought there was not notice prior to the origin of their claims, and decreed that the mortgages of Mode and Johnson should not be paid, but the money should be distributed among the subsequent creditors.

E. K. Price and Darlington for the appellants, supported the general doctrine laid down by the court below, but contended that on the evidence there was notice made out to the subsequent creditors, or some of them, by the testimony of witnesses contained in the depositions as well as by the circumstance of the amount of purchase money in the deed being so far below the value. That the Bank of Chester County was the actor in selling the property in 1829, and received the proceeds of sale. They cited *Bichel v. Rank* (5 Watts 140); *Trimble's Appeal* (6 Watts 133); *Stackpole v. Glassford* (16 Serg. & Rawle 167); *Barnet v. Washebaugh* (Ib. 410); *Shultze v. Diehl* (2 P. R. 273); *Helmbold v. Man* (4 Whart. 410); *Roberts v. Williams* (5 Ib. 185); *Berger v. Hiesler* (6 Ib. 215); *Bellas v. M'Carty* (10 Watts 34); *Garro v. Thompson* (7 Watts 416); *Cronister v. Weise* (8 Ib. 218); *Blythe v. Richards* (10 Serg. & Rawle 265); *Ripple v. Ripple* (1 Rawle 386); *Mix v. Ackla* (7 Watts 316); *Knaub v. Esseck* (2 Watts 282); *Duncan v. Reiff* (3 P. R. 368); *Carson's Sale* (6 Watts 140); *Lowry v. Mehaffy* (10 Watts 389); *Willing v. Brown* (7 Serg. & Rawle 467); *M'Pherson v. Cunliff* (11 Serg. & Rawle 437); *Beale v. The Bank* (5 Watts 529); *Wilcocks v. Waln* (10 Serg. & Rawle 380); *2 Vez.* 485; *1 Story's Eq.* 189; *Jaques v. Weeks* (7 Watts 276); *Lewis v. Bradford* (10 Watts 79); *Frantz v. Brown* (1 P. R. 257).

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Lewis and Dillingham, after citing *Stewartson v. Watts* (8 Watts 392); *Jaques v. Weeks* (7 Watts 270); *Price v. Junkin* (4 Watts 85); 1 *Story's Eq.* 386; 19 *Vez.* 438; 3 *Vez.* 485; were stopped by the court.

The opinion of the Court was delivered by

SERGEANT, J.—Liens on land, which are to bind it in the hands of purchasers, are *strictissimi juris*. They are cautiously prescribed by law, and the modes of entering and continuing them must be strictly complied with. There is commonly a clash of honest claims, in which some one must suffer, and he to whom the law gives the right, prevails. Notions of equity do not control these conflicts; it is a contest for the right, and each party can insist on what the law awards him, all being innocent and struggling for safety. Hence liens with us are matters of record, which on the one hand the party to be affected must consult, on penalty of loss, and on the other hand, if he does so faithfully, he has acquitted himself of his duty. But what would his condition be, if, on consulting the record, he find the lien satisfied and extinguished, and he is yet to run the hazard of all that may be verbally communicated to him, and is bound to institute an inquiry into every thing mentioned in conversation, and ascertain how far it is well founded, what is the proof of it, what its validity and legal construction, what the amount due, what the circumstances attending an old verbal bargain or understanding between the owner and some former person, that a lien should exist which no law or statute recognizes? No person could buy, or creditor lend his money, if he is to be affected by such claims. It would tend to create a species of liens on land not to be found in any office or record, nor known to our law, depending on parol proof at any future day from the mouths of witnesses.

Here the record showed the mortgages satisfied by the sheriff's sale and sheriff's deed. It was not in the power of the sheriff or purchaser or parties to keep them alive as mortgages so far as to affect a third person, by any memorandum in the conditions of sale, or understanding or bargain among themselves. It is not like the case of an unrecorded mortgage or deed; it is the case of a mortgage extinguished—in fact, no mortgage at all, or at most a parol mortgage. Now certainly it is well settled that two parties cannot by their private agreement create a parol mortgage which shall have the legal effect of a mortgage by reason of verbal notice to creditors or purchasers. This would overthrow the recording Acts and the Acts relative to judgments and other liens. It would be inconsistent with the whole tenor of our decisions, contrary to the settled policy of the Legislature, and productive of infinite peril to landholders and creditors, and of strife and uncertainty to the community. In *Kauffelt v. Bower* (7 *Serg. & Rawle* 64), and *Bear v. Whisler* (7 *Watts* 144), it is declared that

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even a vendor who has executed a deed has no lien for the purchase money as against subsequent judgment creditors with notice. It was unnecessary, therefore, to inquire into the alleged notices to the creditors by verbal communications informing them that Kelty bought subject to these mortgages. If it were made out, it would avail nothing, as it was not in the power of the parties to revive and keep on foot an expired mortgage, so as to affect third persons as a lien whether purchasers, mortgagees, or creditors, even admitting that what had occurred before was sufficient, as to Kelty, to estop him.

Judgment affirmed.

Bank of the Northern Liberties *against* Davis.

Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not on a former occasion given different testimony as to a particular fact.

In an action against a bank, declarations by the cashier or teller respecting the genuineness of certain checks purporting to have been drawn by the plaintiff, made at a period subsequent to their presentation, are inadmissible to affect the defendants.

ERROR to the District Court for the city and county of *Philadelphia*.

Assumpsit for money had and received, money paid and advanced and on an account stated, by Isaac E. Davis and others under the name and style of the Shipley Benevolent Society of the Northern Liberties of Philadelphia, against the Bank of the Northern Liberties. The defendants pleaded *non assumpsit* and payment.

The plaintiffs called Alexander P. Milnor, who testified that he was first teller of the bank, and was appointed in November 1839. He then proved the bank-book of the account of James J. Richmond, William Winters and Edward L. Young. This book was headed "Bank Northern Liberties in account with Shipley Benevolent Society of the Northern Liberties." It debited various sums from November 1839 to November 1840, amounting, in all, to \$300.90, and credited various checks from December 1839 to November 1840, amounting to \$305. On being shown certain checks of the dates and amounts stated in the bank-book and signed

"Jas. J. Richmond, Wm. ^{his} × Winters, Edward Young," the witness stated they were all paid by him, and he saw them last in the hands of Robert M. Lee, Esq., about February 1842. He ^{mark}

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stated as to a check of April 16, 1841, signed "Jas. J. Richmond,

^{his}
Wm. × Winters, Edward L. Young," which was produced, that
^{mark.}

to the best of his knowledge he believed it to be the same, though he could not swear, which was presented to him by Mr Lee, and payment refused by the defendants' direction.

The witness then proved the firm-book of the bank, in which
^{his}
were the signatures, "Jas. J. Richmond, Wm. × Winters, Edward
^{mark.}

L. Young," and stated he was present when they all signed. To a question by the plaintiffs whether the checks were genuine, he said; "I paid them as genuine, and I cannot say positively, now, that they are not genuine. There is a slight difference, not more than is usual with persons who don't often write their own names. The omission of the L. in all these checks, I did not observe before. I can't say that they are not genuine. I believe that they were written by the parties, except Winters's name, which, it was agreed, when they signed in the firm-book, was to be written by Richmond. Winters could not write, and made his mark. Young was to write his own name."

1. The plaintiffs then asked the witness whether he had not, on former occasions, given different testimony respecting the genuineness of these checks. The defendants objected to this question, but the court overruled the objection, saying that the witness was an unwilling witness, and might be so treated by the plaintiffs; and the defendants excepted.

The witness then testified; "The mayor of the Northern Liberties pointed out the difference, which I admitted, but did not express any opinion whether they were forgeries or not. I was present before Judge BARTON, and examined in the Criminal Court: did then say, that, with the exception of two checks, my belief was that they were not genuine. The two checks which I then thought were genuine, were these (referring to two of the checks credited in the bank-book). The society said they were genuine."

On his cross-examination he stated that he paid all the checks to Richmond, who presented them; but refused payment of the check of April 16th 1841, because they had overdrawn. That he did not (now) perceive sufficient discrepancy between the checks and the names in the firm-book, to justify the belief that they were not genuine.

2. The plaintiffs then called Robert M. Lee, Esq., who testified that he called at the bank with this check of 16th April 1841, and had a conversation with the cashier and Milnor. The defendants objected to evidence of conversation with the cashier and Milnor, or either of them; but the court admitted the evidence and sealed an exception.

The witness then said; "Milnor admitted the checks were for-

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geries. There was no dispute about the forgery. The cashier said he believed them to be forgeries, but that they would not pay the check. It had better, he said, be decided by suit; and referred me to Mr Tyson."

The defendant then called Milnor, who testified; "I told Mr Lee, when he called at the bank, that the parties had no funds there to pay the check of 16th April 1841. I did not admit the checks were forgeries. I did not observe the omission of the L. from the two admitted checks, when I was examined in the Criminal Court. If it had been adverted to, I should have spoken differently; but I did not speak positively before Judge BARTON."

The jury rendered a verdict for the plaintiffs. The defendants assigned various errors in this court, of which the following only were noticed on the argument.

1. Evidence was admitted by the court allowing the plaintiffs below to discredit their own witness on a particular fact, by introducing matters which took place before the Criminal Court.

2. The statement of R. M. Lee, respecting an alleged conversation between him and Milnor and the cashier, was incompetent.

Tyson, for the plaintiffs in error, cited, on the 1st error, 1 *Stark. Ev.* 185, 237; 1 *Phil. Ev.* 336; *Greenl. Ev.* 492; and, on the second, contended that the declarations of the officers not having been made while acting in their official capacity, were not evidence to affect the bank. *Ang. Corp.* 395.

Graham, contra. Though a party calling a witness is not allowed to impeach his general character, yet he may show he has told a different story on a former occasion. *Cowden v. Reynolds*, (12 *Serg. & Rawle* 281); 1 *Mood. & Rob.* 414; 1 *Stark. Ev.* 215.

The opinion of the Court was delivered by

ROGERS, J.—Leading questions are not allowed on an examination in chief. But if a witness should appear to be in the interest of the opposite party, or unwilling to give evidence, the court will allow the examination in chief to assume the form of a cross-examination. The mode of examination is regulated by the discretion of the court, according to the disposition and temper of the witnesses; and where these appear to be adverse, the court frequently permits a cross-examination by the party who calls him. So a party cannot discredit the testimony of his own witness by general evidence of incompetency; for it would be unfair if he should have the benefit of his testimony if favourable, and be able to reject it if the contrary. Where, however, a party is under the necessity of calling a witness for the purpose of satisfying the formal proof which the law requires, he is not precluded from calling other witnesses, who give contradictory testimony. And even where a witness by surprise, gives evidence against the party

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who calls him, that party will not be precluded from proving his case by other witnesses; for it would be contrary to justice, that the treachery of a witness should exclude the party from establishing the proof by the aid of other testimony. 1 *Stark. Ev.* 216, 188; *Alexander v. Gibson* (2 *Camp.* 556). That the court which tries the cause, should have the power to depart from the ordinary rule in certain cases, is absolutely necessary to prevent a failure of justice: for frequently a party may be compelled to call a witness known to be in the interest of the adverse party, or he may, by artifice and fraud, be entrapped into his examination. As for example, a witness tenders himself ready to prove a fact pertinent to the issue, and when placed on the stand proves directly the reverse, or prevaricates in such a manner as to give the whole advantage to the antagonist party, and this perhaps in concert and by the procurement of the adverse party. In such cases, and others of similar kind, the court before whom the cause is tried, has always, in the exercise of a sound discretion, allowed the party calling him to prove that at different times and in the presence of other persons, he has held different language. This, however, is not substantive evidence of itself, but is permitted to neutralize the evidence given by the witness. The correct distinction is taken in *Cowden v. Reynolds* (12 *Serg. & Rawle* 283). The party who calls a witness, shall not be permitted to impeach his general character, because that must be supposed to have been known before he was called. But where the evidence only tends to show that he had contradicted himself, and thereby lessens the force of what he had sworn in court, it may be received. "Hard indeed," says Chief Justice TILGHMAN, "would be the case of one who calls a witness, expecting that he would swear the truth, if upon finding himself deceived, he may not show that the witness had told a different story at another time." And to the same effect is the case of *Alexander v. Gibson* (2 *Camp.* 555). For where a witness unexpectedly gives evidence against the party calling him, although his evidence cannot be in part relied on, and the rest of it disproved, it may be entirely repudiated, and witnesses may be called on the same side to contradict him. Lord ELLENBOROUGH says, "if a witness is called on the part of a plaintiff, who swears what is palpably false, it would be extremely hard if the plaintiff's case should for that reason be sacrificed. But I know of no rule of law by which the truth is on such occasions to be shut out, and justice is to be perverted." In *Lowe v. Jolliffe* (1 *Blac. R.* 365), which turned on the validity of a will, all the attesting witnesses swore to the insanity of the testator when the will was executed; but they were contradicted by other witnesses, and the will was established. The party is not to set up so much of his witness's testimony as makes for him, and to reject or disprove such part as is of a contrary tendency; but if a witness is called and gives evidence against the party calling him, I think he may

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be contradicted by other witnesses on the same side, and that in this manner his evidence may be entirely repudiated. And this case comes within the principles cited; for the witness, who was the teller of the bank, and who had been examined on a former occasion on the same matter, and who had proved what was deemed material to this issue, was called by the plaintiff on the reasonable supposition that he would testify the same as before, but having failed to do so, the plaintiff's counsel proposed to ask the witness whether he had not on a former occasion given different testimony respecting the genuineness of the check, which was the matter in issue. The question was objected to by the defendant's counsel; but the objection was overruled by the court, the judge saying the witness was an unwilling witness, and might be so treated by the plaintiff's counsel. It is impossible for us to say that in so ruling the court was in error. They are much more competent to form a sound judgment in such a matter than we can be, as so much depends on the manner of the witness, and other circumstances, of which we are ignorant. And if this can be done by the introduction of other witnesses, which seems to be conceded, I can see no reason why the same object may not be attained by a direct examination of the witness himself as to his previous declarations. Indeed, justice to him would seem to require this course, to give him an opportunity of explaining any apparent discrepancy between his testimony and any declarations he may have previously made. In truth, a witness under such circumstances, becomes in many respects the witness of the adversary party, and is subject to the same rules as regulates such examination.

But it is said with truth, that there is error in admitting the evidence of a conversation between Robert M. Lee and the cashier and teller. According to his testimony, the latter admitted the checks to be forgeries. The cashier said he believed them to be forgeries, but he would not pay the checks. It would be better, he said, decided by suit. Declarations and admissions of agents or trustees of a corporation in their official capacity are evidence against those whom they represent, if made in the regular transaction of their business; but if not so made, they are not evidence. *Magill v. Kauffman*, (4 Serg. & Rawle 317). It has also been ruled, that in an action by a bank, evidence of the parol declarations of the officers of the bank is not admissible for the defendant, without proof of the particular officer's being authorized by the board of directors to speak for them, even though it should appear that the board kept no regular minutes of their transactions. *Stewart v. The Huntingdon Bank*, (11 Serg. & Rawle 267). So declarations of a person, who has been president of a bank, respecting payment made on a note, are not evidence in an action by the bank upon the note. 11 Serg. & Rawle 179. The cases are based on this principle, that what an agent says, does,

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or writes, at the time of making a contract, or when engaged in the discharge of his duty as agent, are admissible against the principal. But what the agent says or writes afterwards, is not admissible. *Hough v. Doyle*, (4 Rawle 294). The declarations given in evidence were not made at the presentation of the checks, but afterwards, when they had no authority that I can discover, to make them. Such a power does not come within the general scope of the duty of either, nor is such an authority necessary in the discharge of that part of the business of the bank over which they have the control. They were witnesses for the plaintiff, and might have been called by him to prove that the signature to the checks was not genuine. Indeed, one of them was called to the stand, but, notwithstanding, the court permitted his declarations to be given in evidence to affect the defendant. In this we think the court was in error, and for this reason the judgment is reversed. It is enough to observe that the other errors were abandoned on the argument.

Judgment reversed and *venire de novo* awarded.

Timbers *against* Katz.

Where land is bought by and conveyed to a daughter, whose mother assists her to pay for it with money paid on a bond of her own the proceeds of her land, such money is not necessarily to be taken to have been reduced into possession by the husband of the mother, merely because he joined her in the receipt given to the obligor, if the husband never exacted the payment of the bond and the money did not pass through his hands and he exercised no act of ownership over it.

Between the husband and wife his possession of a chose in action may be qualified by his intention and the ownership follows his will, and it is the same even against creditors or their trustees under the insolvent act.

A verdict and judgment in ejectment are not evidence against one not a party or privy in another ejectment for the same land, and where the same title is in dispute.

ERROR to the Common Pleas of *Montgomery* county. This was an ejectment for a messuage and two acres of land in White-marsh township, brought by John Katz, trustee of John Scheetz, an insolvent debtor, against Jonathan Timbers and Mary Ann his wife, late Mary Ann Scheetz, in which a verdict and judgment were rendered for the plaintiff below.

Both parties claimed under the title of Nicholas Freas. The plaintiff showed a deed for the property in dispute from Nicholas Freas to the defendant, Mary Ann Scheetz, daughter of John

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Scheetz, for the consideration of \$615, dated 1st April 1830, and recorded 16th Feb. 1835. In April 1835, John Scheetz applied for the benefit of the insolvent laws, and on the 17th May 1836, made an assignment to the plaintiff, who gave bond. The plaintiff further showed an application by John Scheetz on the 19th August 1822, for the benefit of the insolvent laws, with an endorsement thereon of the 15th January 1823, "application refused by the court." The creditors returned were John Rex, security in \$100 for a bond given to the German United Assistant Society; John Rex, judgment, \$400; estate of Thomas Shepherd, dec'd., \$100, and a note of Leonard Streeper for \$5. Return, "property all sold by the sheriff." It appeared also that on the 25th May 1822 John Scheetz gave bond to take the benefit of the insolvent laws with John Wrighter security in \$200, and that to April term 1823, John Rex sued John Scheetz and John Wrighter on the bond and recovered \$156.17½, and \$81.60 costs, and Wrighter paid Rex on the 8th August 1826, the sum of \$235.87½ in full. To November term 1832, Wrighter brought suit against Scheetz, and on the 25th November 1834, recovered a judgment for \$350, and costs \$46.25, but remitted all but \$350, and issued a *fi. fa.* and *ca. sa.*, on which Scheetz was arrested on the 22d April 1835, but was discharged on giving bond to take the benefit of the insolvent laws. Jacob Culp was indemnifying bail to Wrighter, and paid Wrighter, who marked the suit to the use of Culp's administrators. Wrighter testified that Scheetz never paid a cent and would not pay: that he always said Rex should never have it: he was determined to cheat him out of it: that he owned a lot at Chestnut Hill which Rex had sold, and he would not pay this.

The plaintiff then called witnesses to show the circumstances of the sale in 1830. Samuel Hiltner testified that in 1830 he agreed to buy the lot now in dispute from Nicholas Freas for \$600. Some of Scheetz's family sent him word they wanted to see him. Freas and he went there together. Elizabeth, the wife of John Scheetz, wanted to buy, and he agreed to let her have it for \$615, and the deed should be made to her. An evening was appointed, and when they came the article was made in the name of Mary Ann Scheetz, (then about 22 or 23 years old), who paid \$100 and signed the article. Scheetz did not interfere. Scheetz and wife and daughter, Squire Keltner the scrivener, and Nicholas Freas were present. Scheetz lived there most of the time. Nicholas Freas testified that Scheetz was originally his tenant. At the request of Hiltner he made the deed to Mary Ann: \$100 were paid when the articles were signed, and \$315 when the deed was made. A mortgage and bond were then executed by Mary Ann for \$100, and \$100 was left on the property for the dower of Freas's mother, and still remained. The last \$100 was paid in 1832 or 1833, by Mrs Scheetz. Freas received interest 2 or 3 years. Mrs Scheetz paid part of the interest, if not the whole.

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She appeared the principal actor. Did not know of Mary Ann paying him any part of the purchase money. Mrs Scheetz lived there. On his cross-examination he stated that Leonard Culp brought the money.

It was admitted Mrs Scheetz was a daughter of Leonard Culp, whose will was proved in November 1824, giving the residue of his estate to his children, and on settlements in 1828 and 1832, the balance of \$5979.63 was in the hands of the executors. Also that under the will of her mother Elizabeth Culp proved in 1831, she was entitled to a share, the balance on settlement being in August 1833, \$3598.53. And further, that under the will of her grandfather, Andrew Bower, proved 1st Dec. 1795, she acquired a legacy of £50 and a lot of land of 30 acres. This land she sold to Leonard Culp, who gave her a bond for it in her own name as Elizabeth Scheetz, about the year 1821, and he paid her \$205 of it at her request when the deed was executed by Nicholas Freas. He had paid her interest every year, and a portion of the principal from time to time as she wanted it: he never paid her husband any. Mary Ann brought some money of her own out of the next room, enough to make up the payment after what he brought. Receipts to the executors were shown, one of 10th May 1831 for \$23.40; one of 10th May 1831 by John Scheetz for \$52.93, balance according to auditor's report, and one of 13th April 1833, by John Scheetz and Elizabeth Scheetz, for \$300, part of her mother's estate. Samuel Culp, who was an executor of her father and mother's estate, stated the payments he made were to Elizabeth Scheetz: John Scheetz got no part of it. She claimed and insisted on having it as her own: it had come from the estates of her grandfather and grandmother and father and mother. John Scheetz was present and he was then very poor. The plaintiff gave further evidence as to the circumstances of Mary Ann, going to show her inability to pay the money.

The defendants then produced the deed dated April 1st 1830, from Nicholas Freas to Mary Ann Scheetz; a mortgage executed same day by Mary Ann Scheetz to Nicholas Freas and bond accompanying the same for \$100 payable April 1st 1831 with interest, and receipts endorsed for interest paid by Mary Ann Scheetz 27th May 1831, and by Elizabeth Scheetz 21st April 1832, and receipt of Nicholas Freas to Mary Ann Scheetz, for \$100, 25th January 1830, the day when the article was signed.

They then called Elizabeth Scheetz, who stated that Mary Ann was the purchaser. She sent for Freas and made the bargain with him for \$615, of which \$75 was to be paid down. After the articles were written, she paid him a \$100 note and took a receipt for it. When the deed was written, she made up the remainder of the money \$315 and gave her mortgage for the \$100. The first \$100 was her money, which she had saved on working out. The witness then stated the various places Mary Ann had worked

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at, and the wages she got; that she borrowed \$215 of witness to purchase the lot. The money came from witness's grandfather's estate, in payment of a bond given her by Leonard Culp. She was to live in the place till Mary Ann wanted it herself. She lived there till Mary Ann married Timbers, some time after which she was put out by the sheriff. Afterwards she got possession again. The money from her father and mother's estate was paid to witness; her husband never had part of it.

The defendants also showed the record of a recovery by Jonathan Timbers and wife against John A. Sutton and John Katz, trustee of John Scheetz, co-defendant, in November 1840.

The plaintiffs in reply offered the record of an ejectment, No. 55, August term 1836, brought by John Katz, trustee of John Scheetz, an insolvent debtor, against John Scheetz, in which there was a verdict for the plaintiff on the 23d October 1837, with proof that it was for the same house and lot and that the same title was given in evidence on both sides. The defendant objected to the admission of this in evidence, but it was admitted and exception taken.

The defendant gave further evidence to show that Mary Ann Scheetz had earned money of her own by going out to work and was able to make the payments she did out of it.

The court charged the jury as follows:

The plaintiff has shown, that in 1835, John Scheetz applied for the benefit of the Insolvent Laws, and that on the 17th May 1836, he made an assignment to Katz, the plaintiff, of all his estate, real, personal and mixed. On the 23d May 1836 Katz gave bond and accepted the trust. In pursuance of this trust this ejectment is brought. It is in evidence that John Scheetz was indebted principally to John Rex. His bail had to pay Rex. In 1823 a suit was brought, and in 1825 a verdict and judgment against Scheetz and Wrighter, his bail. In 1826 Wrighter paid the amount, \$235.07. Afterwards, in 1832, Wrighter brought an action against Scheetz, and in 1834 a verdict and judgment were obtained for \$350. A *fiery facias* issued, and a *capias ad satisfaciendum* also, and John Scheetz was arrested. He then gave bond and was discharged, as we have before submitted to you, and Katz, the plaintiff, appointed his trustee. His discharge was opposed, and he was compelled to amend his schedule of property by the court, and return "all his right, title and interest of the petitioner in and to a messuage and lot of land situate in Whitmarsh township, Montgomery county, adjoining the Ridge Road turnpike and lands of Philip Fye, the widow Leptz and others, now in the occupancy of the said petitioner." The plaintiff has shown you, and it is admitted, Nicholas Freas was the owner of the house and lot in question, and John Scheetz was in possession as his tenant up to the year 1830. The plaintiff has given in evidence the deed of the 1st April 1830, Nicholas Freas to Mary Ann Scheetz, the daughter of John Scheetz.

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The defendants have also given the deed in evidence, and both parties claim under it. Who paid the \$600, the consideration money? or rather, whose money was it? Was it an honest transaction, or was it made to defraud the creditors of John Scheetz? These questions you will consider under the evidence. You have evidence that Mrs John Scheetz, by her father and grandfather and grandmother, was devised a share of their estates. You have heard how and when these legacies and devises were paid. You have heard how John Scheetz was poor and indebted in 1830. How his wife received the money coming to her from the devises of her relatives, and how the daughter, Mary Ann, went out to service some seven or eight years prior to 1830. The first payment was made on the 25th January 1830, of \$100. The receipt is in Mary Ann's name, and in part payment of the purchase money. Whose money was this? On the one hand, it is said to be Mary Ann's earnings; on the other, it is said to have been the money her father and mother received from the devises before-mentioned. On the 1st of April 1830, nine or ten weeks after the first payment was made, a further sum of \$315 was paid. Whose money was this? You have the old lady's account, which is, that she lent to Mary Ann \$200, and the \$115 was paid by Mary Ann. There was a dower of \$100, which still remains on the premises, and Mary Ann gave her bond and mortgage for \$100, which made the whole consideration. You have heard how the \$100 was paid on the 20th April 1833. This \$100 was paid by Elizabeth Scheetz, and receipted for in the name of Mary Ann on the bond. Whose money was this? We will not pretend to detail minutely the whole of the evidence. We ask you carefully to consider it, and we will call your attention to certain legal principles which will result in the case, if you find the facts in a certain way.

When a husband joins in a release or receipt for a legacy, and it is paid to the wife, it is strong *primâ facie* evidence it comes to his possession, and that he has a control over the money. This may be repelled by evidence. Marriage is, in effect, a gift of the wife's personal estate in possession; it may be said to be a conditional gift of her chattels in action, such as debts, contingent interests, money owing her on account of intestacy. The husband has a right to make them his own by virtue of his wife's power over them, lodged by the marriage in his person. Here the legacies to the wife were reduced into possession by his releases and receipts; but it is said she retained possession of the money, and it is contended by the defendant, that after his release he had a right to permit her to vest this money in real estate for their mutual benefit, notwithstanding he was indebted, and in this way defeat his creditors. If you so find the facts, is not the result that the husband had some interest in this investment; and if he had such interest, we instruct you it passed to Katz, the plaintiff, by the assignment. It is well settled that the trustees of an insolvent debtor possess

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all the right of his creditors to set aside a fraudulent or irregular assignment. It is a general principle, that the possession of the wife is the possession of the husband, and it will take evidence to negative this; and when it is reduced to the wife's possession by his release and receipt, I know of no case where the wife can invest it to the exclusion of his creditors for his benefit as well as the benefit of his family. If the jury find her money was so invested, then it is fraudulent and void, as against his creditors, and all his interest in the premises passed to his assignee, the plaintiff in this cause. We are now to consider the defendant's points:

1. "That payment to a married woman, with the assent of the husband, of a legacy bequeathed to her, is not of itself a reduction by him in possession." As an abstract proposition, this is true.

2. "That when a legacy is actually paid to the wife, with the assent of the husband, and she invests it in the purchase of real estate, and takes the deed in the name of another, the property is not liable to the creditors of the husband." This would be true when the husband is not indebted, but if the jury find that the money was invested for the benefit of the husband and his family, to defraud his creditors, it will be void as to them, and all his interest in the premises will pass by the assignment.

3. "That even if the legacy was actually received by the husband, but not afterwards treated as his own, the title of the wife remains unimpaired." If the husband was not in debt at the time, and solvent, we see nothing in this proposition that would be wrong; but we cannot see its applicability to a case where the husband is insolvent at the time he receives the money and permits it to be vested for his future benefit and that of his family, to the exclusion of his creditors.

4. "That if John Scheetz suffered and permitted his wife to use and invest the consideration money arising from the sale of the real estate devised to her in and by the last will of her grandfather, without exercising any control over it himself, or interfering with her disposition of it, and she made a loan or gift of the same to her daughter, the daughter thereby became the absolute owner of the money; and if she purchased the premises in question with the same, her title to the said premises is good, as against the trustee of her father under the Insolvent Laws, and the plaintiff is not entitled to recover." This would be true if John Scheetz was not then indebted, and had no further interest in the premises. But was there a loan or gift? We submit to you whether this was not a family concoction after the money was received, and when the creditors of John Scheetz were pressing him for their debts, to defeat those creditors. If the jury find it was so, and that John Scheetz had a future interest, and it was concocted to defeat his creditors, it would be void as to those creditors to the extent of that interest.

The jury will inquire whether Mary Ann had any money to

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pay; and if she had none, and the house was bought with Elizabeth Scheetz's legacy to defeat the creditors of her husband, and for his future benefit, it would be void as to those creditors. The marriage contract is for better and for worse, and whenever the husband reduces a bequest to his wife into possession, it is then his. When money is so received, and he is insolvent, it cannot be vested to defeat his creditors, and for his future benefit and that of his family; nor can the wife vest it when it is received with his assent to exclude his creditors for their joint benefit.

If the jury find that Mary Ann by her labour paid a part of the purchase money, I think she ought to be protected to that extent. It is conceded to be an honest transaction on the part of Nicholas Freas, the grantor. The assignment of John Scheetz is only of his interest in the house and lot. His interest would only be to the extent of his money vested in it. The suit is not to set aside the conveyance of Freas further than that the plaintiff alleges the property bought by John Scheetz's money. The plaintiff claims under it, and the interest of the creditors of John Scheetz is to the extent of his interest in the premises. If she paid \$100, she would be entitled to one-sixth; if \$200, two-sixths, or one-third; if \$300, to one-half, and so on. If she honestly and *bonâ fide* bought the property and paid her money, and borrowed more to pay for it, it would be her property, and she and her husband would be entitled to your verdict. But if you find that she and her father and mother concocted this plan of conveyance to defeat the father's creditors, and the father's and mother's money paid for it, after the father had assented to his wife's receiving this money, and that it was to be held for their future benefit, there ought to be a general verdict for the plaintiff.

The jury gave a verdict for the plaintiff for an undivided five-sixths of the land, and for the defendant for the other one-sixth.

Errors assigned:

1. The court erred in admitting in evidence the record of the suit, John Katz, trustee of John Scheetz, an insolvent debtor v. John Scheetz, to August term 1836, No. 55.

2. In charging the jury that when a husband joins in a release or a receipt for a legacy, and it is paid to the wife, it is strong *primâ facie* evidence it comes to his possession, and that he has a control over the money.

3. In charging the jury: "Here the legacies to the wife were reduced into possession by his releases and receipts."

4. In their answer to the defendant's 2d point.

5. In their answer to his 3d point.

6. In charging the jury as follows, in answer to the defendant's 4th point: "This would be true if John Scheetz was not then indebted and had no further interest in the premises. But was there a loan or gift? We submit to you whether this was not a family concoction after the money was received, and when the

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creditors of John Scheetz were pressing him for their debts, to defeat those creditors."

7. The court charged the jury that the legacies to Elizabeth Scheetz were reduced into possession by the receipts of her husband, without adverting to the fact that no receipt for or on account of said legacies was signed by him until long after the execution of the deed, and all the purchase money had been paid except the \$100 for which Mary Ann Scheetz had given her bond and mortgage, and without referring in any way to the evidence in the cause tending to repel the fact of such reduction into possession by the husband.

8. The charge assumes that there was evidence of a fraudulent design, on the part of Mary Ann Scheetz and her father and mother, to defraud the father's creditors, when there was no evidence in the cause to warrant the court in so doing.

Mulvany, for plaintiffs in error. The main question is whether the wife's money was reduced into possession by the husband's receipt, so that land purchased with it in the name of another, belonged, as regards creditors, to the husband. We say it was not. A bond or note given to the wife, with the husband's permission, is not a reduction into possession; *Clancy on Marr. Wom.* 353; nor will her merely receiving the money, where she immediately reinvests it, alter her right even as to creditors, if the intention is that it should not belong to the husband. *Hinds's Estate*, (5 *Whart.* 143), where it is said the effect of reduction into possession depends on the intent with which it is accompanied, and that is matter of evidence. In that case it was decided that bank stock bequeathed to the wife during coverture remained hers, though transferred absolutely to the husband, on evidence of his acts and declarations. The effect cannot be different if the debtor pay the money and the husband disclaim all ownership, and the wife reinvest it. Nor is there any reason for a distinction whether there are creditors or not. 3 *Dess.* 155; 2 *Call* 376; 1 *Bac. Ab.* 481. The intervention of creditors makes no difference in the case of a bankrupt or insolvent assignment by the husband; 1 *Ashm.* 334; *Wintercast v. Smith*, (4 *Rawle* 184); and for the same reason the husband may permit the wife to receive the money and reinvest it, without thereby rendering it liable to creditors. It was, therefore, error to say the receipt was a reduction into possession, and withdraw the question from the jury. *Newbold v. Wright*, (4 *Rawle* 195); *Nieman v. Ward*, (1 *Watts & Serg.* 82); 1 *Wash. C. C.* 70.

Hancock and Sterigere, contra. Husband and wife are one, and that is the husband. She has no separate will, and can do no act without his consent. If she received the money with his consent, it became *eo instante* his money, and his assignment passed it

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whether in money or land. The husband's assignment carries the wife's interest in her choses in action; *Richwine v. Heim*, (1 P. R. 373); *Siter's Case*, (4 Rawle 481); and it is clear that before the receipt of the money, the husband might have assigned it. The cases cited from *Clancy* and 2 *Call*, are of the wife's separate estate. In 3 *Dess*. 155, there were no creditors. So in *Hinds's Estate*; and there was also an arrangement between the husband and wife that it should be her property. *Wintercast v. Smith*, (4 Rawle 184), was a case of desertion, and there was no pretence of the husband's receipt. He never made any claim to the legacy.

The opinion of the Court was delivered by

GIBSON, C. J.—This ejectment is brought by the trustee of an insolvent husband, against the husband's daughter, whose mother assisted her with the proceeds of the mother's bond, to pay for land which the daughter had purchased; and the plaintiff insists that the money must be taken to have been in the husband's possession, because he signed the receipt for it: consequently that his creditors may follow it into the land. It was proved that the bond had been a security for the price of land sold by the wife when she was sole; that the husband, though struggling with poverty, had not enforced the payment of it, or exercised any act of ownership in respect to it, till his wife gave the money to their daughter to make up a payment for the land on which the family were living; that the daughter paid another part of the purchase money with her own earnings, and that she mortgaged the land for the residue. There was no evidence that the husband had exacted the money from the obligor, or that it had passed through his hands on its way to his daughter's vendor; or that the husband had taken part in the transaction, farther than to sign the receipt, which was necessary to discharge the obligor's responsibility. Did that constitute reduction to possession?

There was an evident design that it should not; and it is an undoubted rule, that between the wife and the husband himself, his possession, even in fact, may be qualified by his intention, as it was in the case of *Hinds's Estate*, (5 *Whart.* 138), where an absolute transfer of her stock was qualified by his certificate that it was received as a loan. In the case at bar, the husband neither handled the money nor did more than was necessary to accomplish the wife's purpose by discharging the bond. The act was not reduction into possession in contemplation of law, because, as was said by Lord ELDON, in *Wall v. Tomlinson*, (16 *Vez.* 413), in regard to a transfer of the wife's stock to her husband as a trustee, it was done *diverso intuitu*. The sum of the matter is, that the ownership follows the husband's will; for the law will not cast it on him against his consent. Take the case of a wife who sells her land to invest the price of it in other land as her separate es-

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tate, and whose husband joins her in the conveyance and the receipt for the purchase money, as he necessarily must, but with no view of making it his own; surely that would not give him a resulting trust in the land. Now that is the case before us, except that the feme's land was sold by her before her coverture, and the price of it was invested by the daughter, to whom it was given in her own name. If the husband's title must necessarily intervene by reason of the temporary conversion, there can be no way for a feme covert to part with land for land, except by exchange, and that could seldom be effected. If there were not creditors in the way, then the law of the case would be clear for the defendant; and how far does the intervention of their interest affect it?

It must be taken for granted, that the husband refused to touch the money purposely to keep it out of their reach. There was evidence from which the jury might have inferred it, and the fact was doubtless so. Was that a fraud? To have been defrauded, the creditors must have had an interest in the money such as the law would recognize and protect; but they could not have had such an interest, unless the ownership was in their debtor. The stat. 13 Eliz. would operate on nothing less. Now, though marriage is an absolute gift of the wife's chattels in possession, it is but a conditional gift of her choses in actions. To speak more accurately, it is perhaps a gift of her power to dispose of them to himself, or any one else, by force of the dominion to which he has succeeded as the representative of her person. Not to dispute about terms, it is enough for the argument that the gift of the thing, if there be one, is on a condition precedent which must be performed to vest the title, and the husband has not the semblance of ownership in the mean time. If there is a gift of the title on a condition subsequent, what is the contingency which must happen to divest it? Death, without reduction to possession, would not be a condition, but a conditional limitation; and if a limited title resides in the husband during his lifetime, why might not his creditors acquire it by the process of the law, and reduce the chose into possession in his place? It may be said, that the common law has no process by which the title to a chose in action can be reached. The husband's conditional title then, is an unsubstantial thing, and the creditors' derivative interest in it moonshine: for what is the value of a right which cannot be enforced? Yet it is said, that such a right may be prejudiced by a fraud! Choses in action could not indeed be taken in execution at the common law, but they might always be reached by attachment; yet it was ruled by this court, in *Dennison v. Nigh*, (2 Watts 90), and *Robinson v. Woelpper*, (1 Whart. 179), that a wife's outstanding legacy cannot be attached for the husband's debt, because the husband has no property in it. These cases are authorities in point, for they stand on the very principle which lies at the root of the present defence. A wife's chose in action passes by the husband's

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assignment under the insolvent laws, only because it is a voluntary transfer of it for valuable consideration, and an exercise of all his power. Taking the gift then to be conditional, he surely has a right to reject it by refusing to perform the condition. The law certainly does not cast it upon him beyond his power of resistance; for every gift requires the assent of the donee. As to her chattels in possession, indeed the husband has no choice, for her user of them is his user, and whatever benefits her benefits him; consequently, her possession and acts of ownership are his possession and acts of ownership. But a right of choice residing in his person as the representative of his wife, cannot be severed from it or controlled; and on what principle may a creditor insist that he shall exercise it in a particular way? Now, as a creditor must claim through his debtor, and not paramount, the plaintiff, representing the husband's creditors, stands, in relation to the land in contest, in no greater equity than the husband stood before his assignment. But before that time he had suffered his wife to part with her money, and no trust resulted to him by the investment of it in land purchased in the daughter's name.

The record of the plaintiff's recovery against the father seems to have been erroneously received in evidence to affect the daughter, who does not seem to have been party or privy to it. It could be made competent only by showing that the father was her tenant; and if the fact were so, there would have been no need of an ejectment directly against herself and her husband. It is certainly not enough that the former ejectment was for the same land, on the same title, and under the same deed by which the parties at present claim: it is necessary beside that the parties be the same, or stand in privity with those who were.

Judgment reversed, and a *venire de novo* awarded.

Hennessy *against* The Western Bank.

J. K. and J. B. executed a deed under seal, which purported to be an assignment by J. K., J. B. and J. A. K., under the firm of K., B. & Co., "J. A. K. being absent, and acting by his attorney duly appointed," of all their estates, joint and separate, for the payment of partnership and separate debts. After certain preferences, it provided for the payment of all other partnership and separate debts *pro rata*, stipulating for a release within 3 months by residents in the United States, and within 9 months by residents elsewhere. It empowered the assignees to appoint agents or attorneys, and dismiss or revoke them at pleasure, and exempted the assignees from liability for effects not actually coming to their hands, and for losses or defaults arising from the misconduct of agents, unless in cases of wilful neglect of duty, or want of proper care on the part of

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the assignees. The schedule appended, specified various real and personal estate of the firm, and of J. K. and J. B. individually. The only separate property of J. A. K., mentioned in the deed, was a pew in the 10th Presbyterian Church.

Held 1. That the execution of the deed by only two of the firm, followed by a delivery, did not invalidate the assignment.

2. That as it stipulated for a release, it was not valid without containing a transfer of the separate property of each of the partners; though it might not appear affirmatively, that J. A. K., who omitted to execute the deed, had separate property.

3. That the power to the assignees to appoint and dismiss agents, &c., was proper, and they would have this authority without such provision.

4. That the exemption of the assignees from liability for effects that should not come to their hands, and for losses, &c. from the misconduct of agents, &c., did not alter their responsibility.

5. That the clause giving time for a release was proper.

ERROR to the District Court for the city and county of *Philadelphia*.

The plaintiffs, Hennessy and others, had obtained a judgment against John Knox, James Boggs and James A. Knox, trading as Knox, Boggs & Co., and issued an attachment of execution, which was levied on funds in the hands of the Western Bank of Philadelphia, deposited there by William Wilson and David Knox, assignees of Knox, Boggs & Co., or their attorney. These funds were assets, or proceeds of assets, of the firm of Knox & Boggs (consisting of John Knox and James Boggs), and Knox, Boggs & Co. (consisting of John Knox, James Boggs and James A. Knox), or one of them; and at the time the attachment was served, they amounted to the sum of \$7875.25. On the trial of the plea of *nulla bona*, in the court below, the plaintiffs alleged that the assignment was, on its face, insufficient to transfer the property of Knox, Boggs & Co., as against their creditors. The court, however, ordered a nonsuit, on the ground that property fraudulently assigned was not attachable under the Act of 1836, in the hands of fraudulent assignees, and sealed a bill of exception taken by the plaintiffs. The question in this court was on the validity of the assignment, the point on which the court below ordered the nonsuit, having since been decided otherwise in *Stewart v. M'Minn*, (5 *Watts & Serg.* 100).

The following was the assignment referred to :

This Indenture, made the 10th day of May, in the year 1837, between John Knox, merchant, and Mary Ann, his wife, James Boggs, merchant, and Caroline, his wife, and James A. Knox, merchant, all of the city of Philadelphia, the said James A. Knox being now absent and acting by his attorney duly constituted and appointed, of the one part, and William Wilson and David Knox, of the same city, merchants, of the other part: Whereas the said John Knox and James Boggs, lately trading under the firm of Knox & Boggs, and the said John Knox, James Boggs and James A. Knox, trading together under the firm of Knox, Boggs and

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Company, are justly indebted, &c., and are therefore desirous of making such a disposition of their property as to produce the most that can be realized therefrom, to be promptly and justly distributed among their creditors.

Now in order to effect the purposes aforesaid, This Indenture witnesseth, that the said John Knox and Mary Ann his wife, James Boggs and Caroline his wife, and James A. Knox, in consideration as well of the premises as of ten dollars to them in hand paid, &c., have granted, &c., and hereby do grant, &c., unto the said William Wilson and David Knox, and the survivor of them, and the heirs, executors, administrators and assigns of such survivor, all the estates joint and separate, real, personal and mixed, of them the said John Knox and wife, James Boggs and wife, and James A. Knox, or any or either of them; viz. All their real estates, stock, goods, wares, merchandise, bills, bonds, notes of hand, book accounts, debts, claims, demands, choses in action, and other personal and partnership property of every name, nature and description, whether held and standing in the names of the said John Knox, James Boggs and James A. Knox jointly or in common, or in the names of any or either of them, or of either of said firms; a schedule whereof, as nearly and fully as can now [be] conveniently made out, is hereunto annexed, marked A; which schedule is hereby referred to and made a part of this indenture; together with all and singular the buildings, &c., hereditaments and appurtenances whatsoever thereunto belonging or in any wise appertaining, and the reversions and remainders, &c., and all the estate, right, title, interest, property, claim and demand whatsoever, of them the said John Knox and Mary Ann, —, James Boggs and Caroline his wife, and James A. Knox, either at law or in equity, of, in, to or out of the same: To have and to hold the same, and every part thereof, to them the said William Wilson and David Knox, and to the survivor of them, and to the heirs, executors, administrators and assigns of such survivor, for and upon the following trusts, intents and purposes, and for and upon no other trusts, intents and purposes whatever; that is to say—

In trust, to proceed as soon as conveniently may be, at such times and in such manner however as may be in their opinion most for the interest of all concerned, to sell and dispose of all the estates, joint and separate, real and personal, of every nature and description hereby conveyed, or intended so to be, &c., and upon such sale or disposition, good and sufficient deeds, &c., to make, &c., and also to collect and realize the most that may be practicable from all bills, &c.

And upon this further trust, that the said William Wilson and David Knox, in order to facilitate and hasten the accomplishment of the objects and purposes of this assignment, shall and may have full power to appoint, and employ according to their discre-

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tion, one or more agents or attorneys under them, with full or limited powers, and the same at pleasure to dismiss and revoke.

And upon this further trust, in the first place, from and out of the collections and receipts from the estates, real and personal, joint and separate, hereby conveyed or intended so to be, to pay all just and reasonable expenses, &c.

And upon this further trust, in the second place, from and out of the proceeds of the separate estates hereby assigned, or intended so to be, to pay off, satisfy and discharge all the debts due by them the said John Knox, James Boggs and James A. Knox, respectively, for house-rent, household and family expenses, and servants' wages.

And upon this further trust, in the third place, out of the residue of the joint and separate estates hereby assigned, to pay off and discharge in full, both principal and interest, all debts, balances and sums of money due by the said Knox & Boggs, or Knox, Boggs & Co., or for which they are in any way liable or responsible to the several persons and mercantile firms named and mentioned in the annexed schedule marked B, Class No. 1, &c.

And upon this further trust, after the payment in full of the above-mentioned debts, liabilities and responsibilities, then in the fourth place, out of the residue of said estates, to pay off and discharge in full of both principal and interest, all debts, balances and sums of money due or to become due by the said Knox & Boggs, or Knox, Boggs & Co., or for which they are liable or responsible, to the several persons named and mentioned in the said schedule hereunto annexed marked B, and designated therein as Class No. 2, &c.

And upon this further trust, after the payment in full of the above-mentioned debts, liabilities and responsibilities, then in the fifth place, out of the residue of said estates, to pay off and discharge, in full of principal and interest, all notes, acceptances, drafts and endorsements, debts, balances and sums of money, due or to become due by the said Knox & Boggs, or by Knox, Boggs & Co., or for which they are or may be liable or responsible, to the several persons and mercantile firms named and mentioned in the said schedule hereunto annexed marked B, and designated therein as Class No. 3, &c.

And upon this further trust, after the payment in full of all the above-mentioned debts, liabilities and responsibilities, then in the sixth place, out of the residue of such estates to pay off and discharge in full of both principal and interest all notes, acceptances, balances of account, and all other claims and demands whatever, due or to become due by the said Knox & Boggs, or Knox, Boggs & Co., or for which they are, or may become liable or responsible unto the persons and mercantile firms in the said schedule B, hereunto annexed, named and designated therein as Class No. 4, &c.

And upon this further trust, that after the payment in full of

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all the debts, liabilities and responsibilities above-mentioned, in the seventh place, out of the residue of the said estates, to pay off and discharge all other partnership or separate debts, liabilities and responsibilities of every nature and description whatsoever of them the said John Knox, James Boggs and James A. Knox now due and owing or hereafter to fall due to any person or persons, mercantile firms or corporations whatever, &c. And provided further, that no such person or persons, mercantile firms or corporations in this last clause referred to, shall be entitled to ask, demand or receive from the said William Wilson and David Knox, or the survivor of them, or the heirs, executors, administrators or assigns of such survivor, any share, dividend or payment under and by virtue of the provisions of this last clause of this indenture, unless he or they respectively shall and do, if resident within the United States within three months, and if resident without the United States within nine months, execute and deliver in favour of the said John Knox, James Boggs, and James A. Knox, and of each and every of them, and of their executors and administrators respectively, a full, absolute and effectual release of all debts, dues, claims and demands upon them, and upon each, and all of them, reserving howsoever, if need be, his, her or their claim upon any party or parties (other than the said John Knox, James Boggs and James A. Knox) to the contract or engagement if any holden by the said creditor or creditors. Provided always, that in no case under this assignment, shall the joint or separate estates of either one of the said partners be applied to the payments of debts of the other partners is not liable or responsible.

And as to all the rest, residue and remainder of the said trust estate, if any there be after settlement in full of all debts, liabilities and responsibilities of every kind, principal and interest as above directed—

In trust, to pay over the same to the said John Knox, James Boggs and James A. Knox, their respective heirs, executors, administrators and assigns, in such shares and proportions as they may be entitled thereto. And for the better to enable the said William Wilson and David Knox to perform and fulfil the trusts aforesaid, the said John Knox, James Boggs and James A. Knox, do hereby nominate and appoint, authorise and empower the said William Wilson and David Knox as their lawful attorneys, and as attorneys for said firms, to collect, &c. And it is hereby declared, &c., that the parties of the second part or either of them, shall not be held liable for any effects that shall not actually come to their hands, or for any losses, insolvency or defaults that shall happen in the execution of this trust, either in the sale of goods, collection of debts, or misconduct of any agents or attorneys, unless in cases of wilful neglect of duty, or want of proper care, diligence and fidelity on the part of the said assignees.

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In witness whereof, the said parties have hereto interchangeably set their hand and seals the day and year first above written.

Sealed and delivered in the
presence of us

JAMES WARRIN,
JOHN R. VOGDES.

JOHN KNOX,
MARY ANN KNOX,
JAMES BOGGS,
CAROLINE BOGGS,

[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]
[SEAL.]

This was acknowledged the same day by John Knox and his wife and James Boggs and his wife.

SCHEDULE A.

Real Estate, Goods, Merchandise, &c. &c., transferred under the annexed Indenture. Particulars of the Real Estate above mentioned.

No. 1. A certain message or tenement of John Knox and James Boggs, and lot or piece of ground thereunto belonging, situate on the north side of High street, between Delaware Fifth and Sixth streets, in the city of Philadelphia, containing in breadth east and west 17 feet, and in length or depth 96 feet; subject to a ground-rent of \$45.33, and to two mortgages—one to Charles H. Baker, for \$12,000, and the other to Thomas Kelly, for \$6000.

No. 2. All that certain message or tenement and lot or piece of ground of John Knox, situate on the south side of Zane street, between Delaware Seventh and Eighth streets, in the said city, containing in breadth on the said Zane street, about 15 feet, be the same more or less, and extending in length or depth southward, 46 feet.

No. 3. All that certain stable or tenement and lot or piece of ground of John Knox, situate in the square between High and Zane streets, and Delaware Seventh and Eighth streets, in the said city, on the south side of a 50 feet wide court, containing in front or breadth on said court, 22 feet, and extending in length or depth southward, 50 feet.

No. 4. All that certain three story brick message or tenement and two story back building, and lot or piece of ground thereunto belonging of John Knox, situate on the north side of Walnut street, between Ninth and Tenth streets, in the said city, containing in front or breadth on said Walnut street, 25 feet, and in length or depth northward, 120 feet, to a 15 feet wide court running parallel with the said Walnut street, eastward into the said Ninth street, subject to a mortgage of \$10,000 to Samuel Canby.

No. 5. All that two story brick message or tenement of James Boggs, and lot or piece of ground, situate on the west side of Delaware Front street, in the district of Southwark, in the county of Philadelphia, containing together in front or breadth on the said Front street, 33 feet 6 inches, and in length or depth westward, 100 feet; subject to a ground-rent of two-thirds of \$106.67.

No. 6. All those 428 acres of land of John Knox, in Monroe county, in the State of Illinois.

2262	"	"	"	"	"	"	"	Lawrence Co. Illinois.
788½	"	"	"	"	"	"	"	Wabash Co., do.

Total, 3478½ acres.

No. 7. One pew of John Knox in the Tenth Presbyterian church in the city of Philadelphia; one do. of James Boggs, do. do.; one do. of James A. Knox. do. do. One share of John Knox in the Ice Company of Philadelphia.

One do. James Boggs, do. do.

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Household furniture in John Knox's dwelling, Walnut street.

do. James Boggs's, south-east corner of Eleventh and Arch.

One share of James Boggs in the Philadelphia Athenæum.

Debts due in Alabama, ...	\$62,947.22
Arkansas, ...	9,654.42
Illinois, ...	9,603.77
Indiana, ...	3,727.67
Kentucky, ...	24,922.52
Louisiana, ...	1,447.91
Maryland, ...	1,792.96
Mississippi, ...	58,022.96
Missouri, ...	28,549.83
New Jersey, ...	164.59
North Carolina, ...	2,201.15
Ohio, ...	18,349.95
Pennsylvania, ...	20,540.33
Tennessee, ...	227,333.09
Virginia, ...	4,359.95
Wisconsin, ...	1,901.54
Philadelphia, ...	27,038.16
	502,558.02
Stock on hand, ...	46,326.86
Bills receivable, ...	67,115.20
Real property, valued at, deducting mortgages, ...	21,750.00
	\$637,750.08

460 shares of Grand Gulf Railroad and Banking Company's stock, of which 50 shares (75 per cent. paid) are the property of Pleasants & Kelly, borrowed from them, including 160 shares full, and 300 shares whereon 75 per cent. has been paid.

- 66 shares Girard Bank stock.
- 20 do. Delaware County Insurance Company.
- 135 do. American Insurance Company.
- 23 do. Inland Fire do.

The above, with the exception of 5 shares American Insurance Company's stock, have been hypothecated as follows, for moneys received for the use of the firms.

The American Insurance Company hold :—

- 100 shares Grand Gulf Stock, (full paid.)
- 200 do. do. (75 per cent. paid.)
- 10 do. American Insurance Company stock,
- 26 do. Girard Bank stock—

To secure John Knox's notes for \$27,047.60.

The Delaware County Insurance Company hold :—

- 40 shares Girard Bank stock,
- 120 do. American Insurance Company stock,
- 23 do. Inland Fire Insurance do. do.
- 20 do. Delaware Company stock—

To secure John Knox's note for \$5000.

Todhunter & Kelly hold :—

- 100 shares Grand Gulf stock, (75 per cent. paid.)

To secure John Knox's note for \$4000.

Pleasants & Kelly hold :—

- 60 shares Grand Gulf stock, (100 per cent. paid.)

To secure John Knox's note for \$4000.

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SCHEDULE B.

Preferred Debts to be paid under the Provisions of the foregoing Assignment.

CLASS No. 1.

Catharine Morris, money deposited by her.
 William Boggs, money deposited by him.
 Samuel L. Palmer, do. do.
 Sophia Inglis, dividends on stock collected for her.
 Frances Nixon, minor ward of John Knox, legacy collected for her.
 Heirs of the late Charles Diboll, money deposited by them.
 Destonnet Brothers, money borrowed of them.

CLASS No. 2.

Elizabeth Paxson, money deposited by her.
 J. G. Gordon, money deposited by him.
 Dr A. W. Mitchell, do. do.
 James Knox, do. do.
 Levi Ellmaker's Estate, money received.
 M. Floyd, money deposited by him.
 Thomas Sheepshanks, money collected for him.
 Thomas Kelly, money borrowed.

CLASS No. 3.

H. J. Levis, money borrowed.
 Thomas Kelly, his notes lent or exchanged, and his endorsements for our accommodation.
 William Wilson, do. do. do. and account.
 Samuel Hildeburn, do. do. do. do.
 James Gowen, money borrowed, exchanged and lent notes.
 Wingate, Gaskell & Knox, exchanged and lent notes and account.
 Todhunter & Kelly, exchanged notes and moneys advanced on stock deposited.
 Dr Dillard, money borrowed on note.
 William Wright, cash deposited by him, and our acceptance draft on his account.
 Pleasants & Kelly, amount of their cash account and money lent on stocks.
 George Boggs, notes and acceptances.
 Estate of J. Adams, Knox and Nixon, money received for them, clerks and assistants in the store.
 Samuel Hildeburn, Thomas Kelly and William Wilson's joint note lent for the accommodation of the firm.
 Estate of James Smith, balance due for monies collected.
 David Knox's endorsements and balance of account.

CLASS No. 4.

For acceptances, balance of account, and other demands:—

George Hardy, of Lebanon, Ohio.
 Robert Knox, do.
 William Smith, Washington, Pennsylvania.
 Edward S. Barker, Clarksville, Tennessee.
 Charles M. Barker & Co. do.
 Andrew Patterson, Mercer, Pennsylvania.
 Interest on bonds and mortgages.
 Philip Kelly, balance of account.
 G. & W. S. Gray, Somerville, Tennessee.
 All debts due by the firm under one hundred dollars.
 Robert Fleming, Philadelphia.

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James Craig, Philadelphia.

William Mason, do.

Meriwether & Ingrams, money deposited.

Cornelius & Son, amount of account.

A. Patton & Co., acceptances.

Anderson & Baldwin, do.

James Robinson, do.

Dysont & M'Clure, do.

Lile A. Ewing, do.

M. & A. B. Christian, do.

Moore & Rhodes, do.

T. M. Cartwright & Co. do.

S. P. Walker, do.

Wm. M'Laughlin, do.

George Crockett, (note to Parkin).

Richard Cartwright, acceptances.

Henderson & Adams, do.

White, Turpin & Nephew, do.

Fite & Goodner, do.

R. Payne & Son, do.

Wilkins & Carthel, do.

Benjamin Elder, do.

Samuel Ewing, do.

Adams & Crockett, do.

James Devine, cash received.

Sleeper & Brothers, balance of account.

E. N. Scherr, do.

A. L. Gaines, cash remitted.

Brown & Smithers, acceptances.

Henderson & Brothers, conditional acceptances if in funds.

Acceptance for Dr Meriwether.

Notes to insurance companies for premiums of insurance and balances due for policies not taken up.

Recorded May 12th 1837.

Errors assigned :

1. The court erred in deciding that the money deposited in the Western Bank was not subject to be attached by judgment creditors of Knox, Boggs & Co., if the assignment of May 1837 were void.

2. In not deciding that said assignment was fraudulent and void as against the creditors of Knox, Boggs & Co.

3. In ordering a nonsuit to be entered.

J. Fallon and *C. Fallon*, for the plaintiffs in error.

The point sustained by the court below, was ruled otherwise in *Stewart v. M'Minn*, (5 *Watts & Serg.* 100), and the question, therefore, is on the validity of the assignment, which is exceptionable on various grounds.

As it was not executed by James A. Knox, it does not convey his separate estate, which we contend is absolutely necessary, where the assignment stipulates for a release of all the partners, jointly and individually. *Thomas v. Jenks*, (5 *Rawle* 221); *M'Clurg v. Lecky*, (3 *P. R.* 83); *Sheerer v. Lautzerheizer*, (6 *Watts*

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547); *Whallon v. Scott*, (10 *Watts* 237). It is not material whether it appears that he had separate estate or not; it is enough that the creditors are put to the difficulty of knowing whether there is such property, and they have a right to the chance of getting it. This deed contemplated execution by all the partners, and being executed by two of them only, is inoperative. *Dutton v. Morrison*, (17 *Vez.* 199); *Thomason v. Frere*, (10 *East* 418); *Heffernan v. Adams*, (7 *Watts* 121). There is, moreover, individual property of J. A. Knox mentioned in the schedule, viz: a pew, which is valuable as assets. The assignment, even so far as respects the partnership property, is void, because it is under seal, and not executed by all the partners. *Pearpoint v. Graham*, (4 *Wash. C. C.* 234); 5 *Missouri* 463; 1 *Dess.* 535; *Hart v. Withers*, (1 *P. R.* 285). Nor does it appear to be all their property, but that standing in the names of the assignors. *Thomas v. Jenks*, (5 *Rawle* 221).

The time allowed for a release is too short. *Ang. on Ass.* 123; 5 *Greenl.* 253; 4 *Mason* 206. A conditional preference is bad. *Whallon v. Scott*, (10 *Watts* 237). Here Henderson & Brothers were preferred for "conditional acceptances, if in funds." The power to the assignees to sell on credit is bad: so also the power to appoint attorneys authorized to exercise the powers without being liable for their fraud. *Dyott's Estate*, (2 *Watts & Serg.* 564).

Meredith, contra. It is now settled that an assignment by one partner of the partnership property, is sufficient to transfer it, if made for the purpose of paying the partnership debts. *Robinson v. Crowder*, (4 *M'Cord* 519); *Mills v. Barber*, (4 *Day* 428); *Harrison v. Sterry*, (5 *Cranch* 300); *Hodges v. Harris*, (6 *Pick.* 360); *Deckard v. Case*, (5 *Watts* 22); *Ball v. Dunsterville*, (4 *T. R.* 313); *Fichthorn v. Boyer*, (5 *Watts* 159); *Bond v. Aitkin*, (*ante* 166). The only separate estate of J. A. Knox that appears, was a pew mentioned in the schedule, which went into the assignees' accounts. This is a mere good-will, not a property to be levied on, and too trifling to be worth noticing. *Fassit v. Phillips*, (4 *Whart.* 399). And if the assent of J. A. Knox were necessary, it appears he did assent; for it is so recited in the assignment, which is the plaintiff's own evidence. This assignment does assign all their estates joint and several, all their real estate. *Wharton v. Fisher*, (2 *Serg. & Rawle* 178). But it does not appear that J. A. Knox had any separate property besides this pew, and the case of *Thomas v. Jenks* went expressly on the ground that it appeared there was separate property. It is not incumbent on us to prove a negative—that he had none. That would be nearly impossible, and in none of the cases was that objection ever taken. *Thomas v. Jenks*, (5 *Rawle* 221); *Sheepshanks v. Cohen*, (14 *Serg. & Rawle* 35); *Hacker v. Perkins*, (5 *Whart.* 95); *Agnew v. Dorr*, (*ib.* 131); *Tyson v. Dorr*, (6 *Whart.* 256). Nor is a fraud to be presumed.

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The opinion of the Court was delivered by

ROGERS, J.—On the trial the defendant moved for a nonsuit. It was contended by the plaintiffs that they were entitled to a verdict against the Bank, who were the garnishees, because the assignment of May 1837 appeared on its face insufficient to transfer the property of Knox, Boggs & Co., as against their creditors. But the court, disregarding this point, ordered a nonsuit on the ground that property fraudulently assigned, is not attachable under the Act of 1836, in the hands of the fraudulent assignee. In this opinion, however, the court was mistaken, as appears from the case since decided of *Stewart v. M'Minn*, (5 *Watts & Serg.* 101). But if the nonsuit was properly ordered, but for a wrong reason, we must suffer it to stand; and this makes it necessary to consider the second error assigned, "in not deciding that the assignment was fraudulent and void as against the creditors of Knox, Boggs & Co." Various reasons are urged against the validity of the assignment, the principal of which are, that after stipulating for a release from the creditors, who are required to execute the same in a limited time, so as to partake of the fund, the assignors, who were partners, have neither transferred their partnership nor separate estate. Out of this general proposition two questions arise: first, whether the assignment being by deed and made by two of the partners only, is not binding on the third, and therefore void; and secondly, whether the deed is void because it contains no assignment of the separate property of one of the partners.

After the case of *Deckard v. Case*, (5 *Watts* 22), the first point must be considered as settled in this State. It is there ruled that one partner may transfer the whole stock in trade of the firm; and if possession be delivered, and the transaction be *bonâ fide*, it matters not whether the instrument be under seal or not. Here there is no allegation of fraud, and in that respect it comes within the principle of the case cited. There, as here, the objection was made without avail, that one partner cannot bind his copartner by deed. In all essential particulars the cases are identical. The principle that one partner cannot bind his copartner by deed, only holds in an executory and not an executed contract, as for example, where a partner seeks to bind his copartner by a bond for the payment of money, or the performance of a collateral condition. And the cases, when examined, will all be found to be of this description. It would be a strange misapplication of a principle which has been already extended far enough, that where a partner in the regular course of business sells an article by a contract under seal, it should not bind the firm; and further, that even where the article is delivered in pursuance of the contract, it may be avoided. It has been decided that a release is good notwithstanding a seal, and certainly a seal would not destroy the efficacy of a receipt. *Com. Dig.*, title "*Merchant*," note H, 153. By the execution of the contract consummated by delivery, the property

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is transferred to the assignees, which cannot be avoided by the fact that the instrument, which is the evidence of the agreement, is under the seal of one of the partners only. In *Harrison v. Sterry*, (5 *Cra.* 300), it is decided that an assignment of funds for the payment of debts is in the course of trade; and whether it be a general or partial assignment, can make no difference, for they depend upon the same principle. And the views taken by this court in *Deckard v. Case*, are borne out fully in *Robinson v. Crowder*, (4 *M'Cord* 519); *Mills v. Barber*, (4 *Day* 425); and *Hodges v. Harris*, (6 *Pick.* 360).

But is an assignment, which stipulates for a release, valid without containing a transfer of the separate estate of each of the partners? And we are of opinion it is not. The creditors have, under such circumstances, a right to require a transfer of all the property liable to their debts; otherwise they may refuse to release, without losing their recourse to the property of the debtor; for so far as regards the creditors who do not come into the terms prescribed by the deed, it remains, notwithstanding the assignment, the property of the debtor. It is unreasonable to require the creditor to release his debt, unless upon the unconditional surrender of the whole property of the debtor, whether it consist of partnership effects or of the separate individual property. And this is the principle clearly asserted in *M'Clurg v. Lecky*, (3 *P. R.* 83); *Passmore v. Eldridge*, (12 *Serg. & Rawle* 201); *Adlum v. Yard*, (1 *Rawle* 163); *Johnston's heirs v. Harvy*, (2 *P. R.* 92); and *M'Allister v. Marshall*, (6 *Binn.* 338). A debtor cannot make a reservation at the expense of his creditors, of any part of his income or property, for his own benefit, nor can he stipulate for any advantage either to himself or family. It would be in vain to make these decisions, if in the case of partnerships each partner could withhold his separate estate from his creditors. If he cannot reserve or stipulate for any advantage to himself or family, for the same reason he cannot be permitted to withhold his separate estate from his creditors, and at the same time exact from them an unconditional release. True, it may not appear affirmatively that the partner, who neglected or refused to execute the deed, had any separate property; but this is totally immaterial, as it would not, in our judgment, help the assignment, even if it should subsequently appear that the debtor, contrary to the fact in ninety-nine cases out of a hundred, was entirely destitute of any estate whatever. It is an indispensable condition to the validity of an assignment of an insolvent debtor, that the deed itself should contain a transfer of all his property, whether belonging to the firm or to each partner in his separate capacity. If on inspection of the deed the creditors observe that it is defective in that essential particular, they may refuse to execute a release, and are not bound to investigate the fact whether the partners have or have not separate estate. They may rely on the common sense

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presumption that they have some separate property, and it would be unreasonable to require them to go further. To suffer insolvent debtors to omit such a transfer, would lead to great frauds, which even now, with every care and circumspection, it is so difficult to prevent. In truth, under our imperfect system, guard as we may, creditors are nearly if not quite at the mercy of their debtors. It operates as a means of coercion on them, with every advantage on the side of a fraudulent debtor; and this would be much increased if we should tolerate assignments, the direct tendency of which would be a temptation to withhold valuable estates from the grasp of creditors.

But this is not only true in principle, but we have the benefit of a direct decision on the point. The creditors, as is said in *Thomas v. Jenks*, (5 Rawle 226), are entitled to the benefit of the whole estate, of which they are not to be deprived by an arrangement which would impose upon them the necessity of resorting to a part of it in exclusion of the rest. The very imposition of a choice, which might prove unfortunate, would be an exposure of them to a peril which they are not bound to encounter. An assignment, therefore, that would present but a part of the effects to the creditors, and refuse the rest, is necessarily fraudulent, inasmuch as it might be a means to extort an unfair advantage. Now an assignment of partnership effects only is a partial one; and although in the case cited, it appeared affirmatively that the debtor had separate estate, yet the cause did not turn on that point, but upon the broad principle that the creditor had a right to an assignment embracing in its terms clearly and explicitly as well the separate as the joint property of every member of the firm. And this surely is imposing no hardship on the debtors; for if they have separate estate, the creditors are entitled to the benefit of it: if they have none, the deed is so far inoperative. The creditors have a right to the chance of after-discovered property, of which it may be possible the debtors at the time of the execution of the deed were ignorant. This construction has this great recommendation in my mind, that it may in many cases prevent debtors from attempting to impose onerous conditions on creditors, taking advantage of the perilous situation in which they may place them, who may for this reason only, be constrained to take part rather than run the risk of losing their whole debt.

We see nothing wrong in that part of the deed which, in order to facilitate and hasten the object and purposes of the assignment, gives full power to assignees to appoint and employ, according to their discretion, one or more agents or attorneys under them, with full or limited powers and the same at pleasure to dismiss and revoke. There is nothing more in this clause than what is usually contained in every letter of attorney. And in this case such a provision was absolutely necessary, as it will be literally impossible for the assignees to give their personal attention to the col-

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lection of the numerous debts owing the firm in different parts of the United States. Indeed from necessity the assignees would have the same authority, even without any express power in the deed. If the assignees exercise their discretion improperly, as is apprehended, they will subject themselves to personal liability. Nor do we see anything exceptionable in exempting the assignees from liability for any effects that shall not come to their hands, or any losses, insolvencies or defaults that shall happen in the execution of the trust, either in the sale of the goods, collection of debts or misconduct of agents or attorneys, unless in cases of wilful neglect of duty or want of proper care, diligence and fidelity on the part of the assignees. As I construe this clause, the assignees can claim no other exemption they would not have been entitled to without it. They are liable for want of care, diligence and fidelity, and this would be the extent of their responsibility upon the general principle of principal and agent. They would not, at common law, be answerable for the acts of their agents, where proper care was taken in their selection, unless there was an omission of ordinary diligence on the part of the assignees in compelling them to perform their duty. So also, it would be unjust to charge them with property which never came to their hands, unless it appeared that it might have been reduced into possession and was not so in consequence of their supineness and neglect.

Neither do we see any difficulty in the way of the assignees, arising from the fact that persons who reside in the United States are allowed but three months, whereas those who reside out of the United States are allowed nine months to execute a release. Such a discrimination is but just, as it gives every creditor a sufficient time to examine the assignment, inquire as to the assets of the debtor, comply with its requisitions and thereby entitle himself to a participation in the fund. A creditor should decide on the expediency and justice of releasing his debt, with a view to that debt, the conduct of the debtor, the amount of his assets, and not with a reference to the probable action of other creditors.

Judgment reversed, and a *venire de novo* awarded.

Moore *against* the Commonwealth.

A justice of the peace may discharge from prison one committed by him for a bailable offence, whether felony or misdemeanor, taking a recognizance for his appearance at court to answer.

ERROR to the Common Pleas of *Montgomery* county.

Commonwealth against William Moore. This was an action of debt on a recognizance entered into before a justice of the peace by the defendant and Michael Moore, for the appearance of Michael at the next court of Quarter Sessions of the Peace to be held for the county of Montgomery, to answer a charge of larceny. The recognizance had been returned to the office of the clerk of the Quarter Sessions and filed, and an entry of its forfeiture appeared on the docket.

The defendant offered to prove by the justice of the peace by whom the recognizance was taken, that when the prisoner was brought before him he was fully committed, and that after being committed, he went to the prison with William Moore (the defendant) and took the recognizance of the prisoner and the recognizance of William Moore as his bail, and the prisoner was discharged. The court rejected the testimony, and the defendant excepted and assigned the rejection of it for error.

Brooke for the plaintiff in error referred to 1 *Chitt. Cr. Law* 93, note 33, (*Amer. ed.* 1836), and *Commonwealth v. Canada* (13 *Pick.* 86).

G. R. Fox contra.

The opinion of the Court was delivered by

SERGEANT, J.—A search into the law on the subject has satisfied me that a justice of the peace in this State has power to discharge from prison one committed by him for a bailable offence, whether felony or misdemeanor, taking recognizances for his appearance at court to answer. That this is the principle of the English law appears from Chitty and other books. He says if a party is not ready with bail at the time he is apprehended and the offence be bailable, he may at any time before conviction be released from imprisonment on finding sureties; and after the recognizances have been entered into, the justice before whom the transaction takes place, will issue his warrant called a *liberate* to the gaoler to discharge him. 1 *Chitt. Cr. Law* 102; and in 4 *Chitt. Cr. Law* 119, the forms of this discharge are given. In England it appears

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that though in misdemeanors a single justice may bail, yet in felony by virtue of the statute 1 and 2 *Phil. & Mary, c. 13*, bail can be taken only by two justices present at the same time. In Pennsylvania, however, I conceive the practice always to have been for one justice to take bail as well in felony as in misdemeanor, excepting in capital cases, by virtue of the Act of 1705, which has remained in force. This enacts that all persons shall be bailable by one or more sufficient sureties, to be taken by one or more of the judges or justices that have cognizance of the fact, unless for such offences as are or shall be made felonies of death by the laws of this province. The same thing is recognised in other Acts. Our system seems rather built on the 7th section of the 1 and 2 *Phil. & Mary, c. 13*, by which in the city of London and county of Middlesex and other cities, boroughs and towns corporate, one justice may let to bail felons and prisoners as before accustomed. This is not surprising when we remember that William Penn and his companions introduced with them so many of the usages and legal principles peculiar to those places. It seems by no means necessary in such case that the magistrate should visit the prison for the purpose, since the bail of others is good in that case; though where the person charged is not an infant or in prison, he ought to be bound in the recognizance as well as the bail. 2 *Hale's P. C.* 126.

It may be proper to say that the case of *Commonwealth v. Canada* (13 *Pick.* 86) was determined on the peculiar provisions of the Acts of Assembly of Massachusetts, not existing in this state, and even there the power of the same justice who committed to enlarge on bail after commitment seems admitted.

The evidence offered would therefore seem to have been inadmissible as furnishing no defence.

Judgment affirmed.

Leeds against Bender.

The report of an auditor appointed to distribute monies raised by a sheriff's sale of real estate is not evidence in a subsequent ejectment for the land brought by the sheriff's vendee.

Such auditor can in no case set aside a judgment of a court brought before him. He must either allow its amount according to its date, or suspend his decision till its validity is decided.

A person in possession of land and continuing so for 21 years, claiming it as his own, is within the prohibition of the limitation Act as well against a claim never made or heard of, as against a claimant with whom there is a dispute.

ERROR to the District Court for the city and county of Phila-

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delphia, in an ejectment brought by Charles W. Bender against Ann Leeds for a house and lot in Duke street between Front and Second streets, in which the plaintiff below recovered a verdict and judgment. The facts sufficiently appear in the opinion of this court.

H. Hubbell, for the plaintiff in error.

H. M. Phillips and *Clarkson*, contra.

The opinion of the Court was delivered by

HUSTON, J.—This case, which was an ejectment by Charles W. Bender against Ann Leeds for a house and lot particularly described in the writ, was either brought before the District Court in an unusual manner, or, what appeared in that court is brought here in a very defective manner, and perhaps this latter is the case. The paper-book states that the plaintiff commenced his case by making out his title, having given in evidence a mortgage from Walters to Knight, 1819; *scire facias* Knight v. Walters, of Dec. term 1839; *levari facias* to March 1840; *alias levari facias* to June 1840, and the return; deed-poll, Fitler (sheriff) to Bender. There was contradiction between the counsel, as to whether any deed or title to Walters, or other title in him was shown, except what came out incidentally from witnesses: and it does not appear whether any of them had seen any deed to him. This objection does not seem to have been made at the trial in the District Court. The case there seems to have been put on other grounds.

I cannot find from the paper-book whether the proceedings before an auditor appointed to appropriate or apportion the money produced by the sheriff's sale, were introduced by the plaintiff immediately after what is stated above, or whether it was offered and received after the defendants had given the evidence hereinafter stated; nor is it material. The reference, all the evidence given before the auditor, and his decision on that evidence, declaring a judgment in favour of Ann Leeds against Walters fraudulent and void, were all objected to, admitted and read to the jury, and would seem to have been taken as conclusive as to that part of the case; for the credibility of the witness, Walters, though contradicted by five or six witnesses, was not even alluded to as a matter for the jury, so far as we see by the abstract of the charge sent to us.

It appeared that Walters, who is near about fifty years old, was a son of Ann Leeds: that she had a daughter by Leeds, her second husband, who was examined. The paper-book does not even pretend to give the words, and hardly the substance of her testimony. She proved that Walters often got money from his mother; once when he set up a store; again at other times, and when he bought the house in question; that it was intended the deed should be

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made to his mother, Ann Leeds, who went into possession in April 1819, immediately after the purchase, and had lived in it ever since, claiming it as her own. This continued possession was proved by five witnesses, who knew her all the time. Two witnesses swore they had heard Walters say, before he bought, that he was to buy it for his mother, and after, he had bought it for his mother. The report of the auditor contained testimony to the following purport. That in the summer or autumn of 1839, William M. Kennedy, Esq. being absent, Mr Dodson attended to business for him, and Walters, who had been a client of Kennedy, called to have a bond for a large sum drawn to his mother, Mrs Leeds, with warrant to confess judgment. Mr Dodson wished to have some evidence of the debt. After some time, and more than one interview, at length he came and brought Mrs Leeds and produced as follows: his note to Ann Leeds, dated Sept. 15, 1809, for money borrowed, \$750; do. October 28th 1819, do. \$1000; do. Aug. 20th 1815, do. \$1500; do. Feb. 28th 1819, do. \$2000; do. Nov. 16th 1823, do. \$992. This last stated that it was for interest on former notes to that time. The signature to all these was proved to be that of Walters. The bond was drawn dated 21st August 1839, executed in the presence of Mr Kennedy, who had returned, and judgment confessed on it the same day: and also another judgment to a beneficial society.

This Mr James C. Walters was then called and sworn before the auditor. "This bond was executed by me. I never received any consideration for it, and do not owe any money on it. I cannot answer as to the circumstances of giving it. I decline so to do, as it might criminate me. Mrs Ann Leeds is my mother. I did not owe her the money for which the bond was given." Walters was also offered in court, objected to, but admitted. His testimony was as follows. That he did not owe, nor never owed Ann Leeds one dollar: admitted that the handwriting to the bond and power to confess judgment was his; and stated that he had done it to save something from his creditors. He also swore he did not buy the property in dispute with his mother's money, and that the deed was not intended to be made out in her name at the time of the purchase; although he admitted that he bought it that she might have a home as long as she lived, and that he had never demanded or received any rent from her during the time she had possession, 23 years from April 1819. He was called a second time to contradict two witnesses who had been called to prove what he had said at different times. The defendant then called three other witnesses, who severally swore they had heard him say, he bought it for his mother. Rebecca Leeds had sworn that he often got money from his mother, at the time he set up a store, and at other times, and gave his notes. That he got money from her when he bought the house in question. That he said it was hers,

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and he would give or pay her no more. That Mrs Leeds at one time kept a store in Front street, but not since this house was bought.

As this cause goes back, perhaps other testimony, as to what her circumstances were at one time, and what property or money he had independent of her, may be proved; and it may be a grave question what credit is to be given to a witness contradicted as to most of what he swore, and who, by his own testimony, was guilty of great dishonesty, almost forgery, in fabricating five false notes to defraud his creditors. There was clearly error in admitting the testimony and the decision of the auditor declaring Mrs Leeds's judgment void. It escaped the very accurate and learned Judge that this point had been decided in *2 Watts & Serg.* 557. It is a fallacy to say counsel may always read the record of the cause; that is not true; in the same cause you can neither read the report of arbitrators nor a former verdict. But this was not the same cause, but a different one from that in which the report was made; and moreover, an arbitrator to apportion money among lien creditors, can in no case set aside a judgment of account brought before him. He must either allow it for its amount according to its date, or suspend his decision until its validity is decided on in the court in which it was entered or in some other legal way.

One thing more. The Judge correctly told the jury, that to protect the defendant, she must have held it 21 years adversely to J. C. Walters and those claiming under him; but I am not sure the jury understood what, in law, is an adverse possession. It is not necessary that there should be a claim on one side and a denial of that claim by the one in possession. It was distinctly stated by this court in *Rung v. Shoneberger*, and several times since, that a person in possession and continuing so 21 years claiming as his own, is completely and fully within the protection of the Act. His claim for himself is a claim adverse to all the world, and protects equally against a claim never made or heard of, as against a claimant with whom there is a dispute every day. Also there are five witnesses who swore Walters said he bought it for his mother; and after putting her in possession and leaving her 22 or more years, it would not make much difference whether it was a gift or payment of a debt. Walters himself says he bought it and put her there that she might have a home as *long as she lived*. This statute is a most important and beneficial one. It was made to protect those who had no other protection—for cases where all evidence is lost. I have attended to its operation almost half a century; and I do not know any more beneficial, and, in its general operation, more just law. It gives as perfect a title, if not a more perfect title, than any other known to our law; and, as a general rule, the cases in which it has been attempted to be avoided after

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the clear lapse of 21 years, have been marked by combination of those interested, though not known to be so — by rash swearing, and sometimes direct perjury.

Judgment reversed, and a *venire de novo* awarded.

Johnson *against* Hart.

Deed of land to H. S. and J. H. and L. his wife and their heirs as tenants in common and not as joint tenants, *held* to convey one moiety to H. S. and the other moiety to J. H. and wife.

ERROR to the District Court for the city and county of *Philadelphia*, in an action of ejectment, in which judgment was entered for the plaintiff on a case stated, for one half the premises.

It was an action brought by Lydia Hart against Sarah S. Johnson and the children of John Hart, deceased, to recover the difference between one third and one half, or one sixth of certain premises conveyed by Mrs De Brahm to Mrs H. Speakman and John Hart and Lydia his wife by deed dated 6th May 1800, to hold to them and their heirs and assigns as tenants in common and not as joint tenants. Mrs Speakman and John Hart and Lydia his wife, afterwards by deed dated July 11th 1805, granted one undivided third part of said premises to Sarah Spackman, who afterwards by deed dated 12th April 1806, granted the said one third part of the premises to John Hart in fee.

The question was whether under the first recited deed Mrs H. Speakman took a third part or a moiety of the premises thereby conveyed. If the court decided she took but one third, judgment was to be entered in favour of Lydia Hart for one third. If she took one half, judgment to be entered in favour of Lydia Hart for one half.

Mrs Speakman was the mother of Lydia Hart, the plaintiff, and on her decease intestate, one third part of her interest in the premises descended to her. Lydia survived her husband John Hart, who died intestate leaving a number of children.

The first-mentioned deed was as follows :

This Indenture, made the 6th day of May 1800, between Mary de Brahm of Bristol township in the county of Philadelphia, &c., widow, of the one part, and Hannah Speakman of the city of Philadelphia, &c., widow, and John Hart of the same city, druggist, and Lydia his wife, of the other part, Witnesseth, that the said Mary de Brahm, for and in consideration of the sum of \$10,000 lawful silver money of the United States of America,

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unto her in hand well and truly paid by the said Hannah Speakman and John Hart and Lydia his wife, at the time of the execution hereof, the receipt whereof is hereby acknowledged, hath granted, &c., and by these presents, doth grant, &c., unto the said Hannah Speakman and John Hart and Lydia his wife, and to their heirs and assigns, as tenants in common, and not as joint tenants, all that capital messuage, &c., to have and to hold the aforesaid messuage, &c., with the appurtenances, unto the said Hannah Speakman, and John Hart and Lydia his wife, their heirs and assigns, to and for the only proper use and behoof of them the said Hannah Speakman, and John Hart and Lydia his wife, their heirs and assigns for ever, as tenants in common and not as joint tenants. And the said Mary de Brahm and her heirs, the aforesaid messuage, &c., with the appurtenances, unto the said Hannah Speakman and John Hart and Lydia his wife, their heirs and assigns, as tenants in common, and not as joint tenants against herself the said Mary de Brahm and her heirs, and against all and every other person and persons whatsoever, lawfully claiming or to claim by, from or under her, them or any of them, shall and will warrant, and for ever defend by these presents. And the said Mary de Brahm, for herself and her heirs, executors and administrators, doth hereby further covenant, grant and agree that all and singular the said hereby granted premises, with the appurtenances, now are free from all encumbrances whatsoever. In witness whereof, &c.

Williams for the plaintiff in error contended that Mrs. Speakman took by the deed only one third, as tenant in common with John Hart and Lydia Hart, who each took one third, and therefore the plaintiff was not entitled to recover as heir of Mrs. Speakman. The deed in the premises shows that the consideration moved from each, and that there was to be no joint tenancy: the habendum and warranty are the same, and the receipt for the purchase money is from each. A husband and wife can hold as tenants in common during coverture. Marriage does not alter the estates they had before, and if they held jointly before, they hold so afterwards. If there is a grant to the husband and wife and a third person, one for life, one in tail and one for years, each takes one third. *Fitz. N. B.* 194; *Co. Lit.* 187 b. So if there is a gift to the use of a man and woman, marriage afterwards will not make them tenants by entireties. 2 *Prest. Ab.* 41. Under a grant to husband and wife and to a third person, as tenants in common, each has an interest of one third in severalty as tenant in common. 1 *Prest. Est.* 132; 4 *Kent's Com.* 363; 1 *Rop. Husb. & Wife* 51. An estate in the husband and wife by entireties cannot be created by a conveyance to them as tenants in common. An estate by entireties is one kind of estate in joint tenancy and by

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the words here "and not as joint tenants" all kinds of joint tenancy are excluded.

Price, contra. Without the clause "tenants in common and not as joint tenants," the husband and wife would have taken by entireties (2 *Prest. Est.* 39), that is the husband and wife would have one half and the other party another half. There can be no other estate granted to husband and wife than by entireties; they cannot take by moieties; the husband cannot sever it; they constitute one person. 2 *Bl. Com.* 184; 1 *Prest. Ab.* 137. The words are used with the view of excluding Hart and wife from taking as joint tenants, and of conveying to them as tenants in common with Mrs Speakman. If such be the conveyance, then it is clear the husband and wife take one half by entireties, and Mrs Speakman the other half. The conveyance is to H. S. and J. H. and Lydia his wife, not Lydia Hart. Legacy to A, B and C, and the wife of C, to be equally divided amongst them; the husband and wife took one third. *Bricker v. Whalley* (1 *Vern.* 233); *Skin.* 182. A conveyance to husband and wife gives an estate by entireties and not a joint tenancy. *Green v. King* (2 *Wm. Black* 1211): 5 *Ch. Rep.* 437. The point before the court is expressly decided in 16 *Wend.* 615; 5 *Halst.* 42; 3 *Rand.* 179.

The opinion of the Court was delivered by

KENNEDY, J.—The only question raised in this case is whether under the deed from Mary de Brahm to Hannah Speakman and John Hart and Lydia his wife, Hannah Speakman took an undivided moiety of the estate thereby conveyed or only an undivided third part thereof; or, in other words, whether John Hart and Lydia his wife did not each take an equal undivided third part of the same as tenants in common, or only an undivided moiety of the whole, to be held by them jointly as tenants in common with Hannah Speakman. Had the estate been granted to them to be held as joint tenants and not as tenants in common, it would, according to all the authorities on the subject, be quite clear that Hart and his wife would only have taken an undivided moiety of the whole, and Hannah Speakman the remaining moiety. But it is contended that as the estate was granted to them to hold the same as tenants in common and not as joint tenants, each of the three, therefore, in order to carry into effect fully the meaning of the words of the habendum, must be considered as having taken an equal undivided third part thereof. And in support of this Mr Preston in his first volume on estates, p. 132, has been cited, where he says "in point of fact and agreeable to natural reason, free from artificial deductions, the husband and wife are distinct and individual persons; and accordingly where lands are granted to them as tenants in common, thereby treating them without any respect to their social union, they will hold by moieties, as other

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distinct and individual persons will do." And Mr Preston, to sustain what he has thus said, refers to *Co. Lit.* 187 b., where Lord Coke says "if a man make a lease to A. and to baron and feme, viz: to A. for life, to the husband in tail and to the feme for years, in this case it is said that each of them hath a third in respect to the severalty of their estates." Then Mr Preston proceeds to say "also when a grant is made to a husband and his wife and a third person as tenants in common, each of these three will have a distinct and separate interest in and tenancy of a third part."

Now although it may well be in the case mentioned by Lord COKE, that the husband and wife would each take a third, as a separate and distinct estate is given to each of them severally in express terms, so that if they take at all consistently with the terms of the grant, it must be a several and not a joint interest; but in the case put by Mr. Preston, the same meaning does not necessarily apply; for to many purposes, if not generally, husband and wife are regarded as one person only in law; and as the case in its terms does not preclude this idea of unity, they may be considered as taking a joint interest in an undivided moiety of the whole, and as holding the same as tenants in common with the third person, who has and holds the other moiety also as tenant in common. Hence, according to Littleton, sec. 291, if a joint estate be made of land to husband and wife and to a third person, the husband and wife have but a moiety in law, and the third person the other moiety, because the husband and wife are but one person in law. Bracton saith, *vir et uxor sunt quasi unica persona, quia caro una et sanguis unus.* *Co. Lit.* 187 b. "And therefore," says Judge BLACKSTONE, in the 2d vol. of his commentaries, p. 182, "if an estate in fee be given to a man and his wife, they are neither properly joint tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but both are seised of the entirety *per tout et non per my*; the consequence of which is, that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor." And in a case before Lord Keeper NORTH, (*Skinner* 182), A. B. having three nieces, one of whom had a husband, bequeathed a legacy to the husband and wife and the other two equally; and held, that the husband and wife took one third only of the legacy, and that the remaining two nieces took each a third thereof; because, as the Lord Keeper said, the husband and wife took only as one person, according to the rule of the common law. So in *Barker v. Harris*, (15 *Wend.* 615), whereby a deed of settlement, the grant was to a husband and wife and to six of their children, naming them, and to such other, &c., to hold as tenants in common, it was ruled, that the husband and wife took only as one person, notwithstanding the estate was granted to them to be held in common and not jointly.

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It would therefore seem, according to the weight of authority and opinion too, that John Hart and Lydia his wife, took only a moiety of the estate conveyed by the deed from Mary de Brahm, and not each one third thereof, as contended by the counsel for the plaintiff. This construction also appears to be more consonant to the intention of the parties as indicated by the form of the expression used both in the premises and the habendum of the deed for the purpose of describing or designating the grantees, which is as follows, viz: "Hannah Speakman of &c. and John Hart of &c., and Lydia his wife, of the other part;" thus naming and describing them in the same manner precisely as if it had been intended to make Hart and his wife take as one person only. Had it been intended to make them take as two distinct and individual persons, such intention would have been better and more clearly expressed by having omitted the conjunction "and" inserted immediately before the name of Hart, after naming Hannah Speakman. Then it would have read "Hannah Speakman of, &c., John Hart of, &c., and Lydia his wife, &c." But it is not necessary to say here that this change, had it been observed, would have been sufficient to have given to Hart and his wife, each one third of the estate, as language showing such design beyond all question or doubt, could have been employed, had the parties so intended it. It is enough to say that the language of the deed does not show it clearly, and hence we are of opinion that Hart and his wife took only a moiety of the estate conveyed, and that Hannah Speakman took the other moiety thereof.

Judgment affirmed.

Dallam against Fitler.

The retention of the possession of goods by the assignor, after a voluntary assignment in trust for creditors, with the permission of the assignee or his vendee, does not make the transfer of the goods fraudulent *per se*.

Constructive possession is sufficient to maintain trespass.

In trespass against a sheriff, for seizing and selling the plaintiff's goods under a judgment against another person, the amount paid out of the proceeds of sale for rent of the premises, cannot be received in evidence to abate the damages.

THIS case was tried at *Nisi Prius* in February 1843 before Mr Justice KENNEDY, and a verdict and judgment were rendered for the plaintiff. It was an action of trespass brought by Josias W. Dallam against Sheriff Fitler, for seizing and selling certain household goods belonging to the plaintiff. On the 9th August 1839 Charles T. Ruete made a general assignment to Anthony Elton,

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in trust to pay creditors, which was recorded on the same day. An inventory and appraisement were made on the 21st August, and filed in the prothonotary's office on the 23d, and on the same day the assignee sold the goods in question to the plaintiff, for \$363.75, and a bill of sale was executed. The next day the assignee filed his affidavit to the inventory, and gave bond with approved sureties. The goods were left in the possession of Ruete, who held them after the sale for the plaintiff. In November an execution was issued on a judgment in favor of Charles Leo Wolf against Ruete, and the goods were taken by the sheriff out of the hands of Ruete and sold, notwithstanding notice given of the plaintiff's title.

On the trial the defendant alleged and offered to prove, that \$121.83 were due at the time of the sheriff's sale, for rent of the premises on which the goods were lying when seized, and that the sheriff paid this sum to the landlord out of the proceeds of sale. This evidence was objected to by the plaintiff, and overruled by the judge, who sealed a bill of exception.

The following were the points on which the learned judge was requested by the defendant to charge the jury, and his answers thereto:

1. That the continued possession of Ruete rendered the goods subject to an execution at suit of a creditor of said Ruete.

Ans.—The continued possession of Ruete would not *per se* render the goods subject to an execution at the suit of a creditor of the said Ruete.

2. That there was no change of possession, as against the creditors of the said Ruete.

Ans.—If the transaction was fair, and no wise tainted with actual fraud, the assignment or transfer of the goods by the assignor to the assignee, would in law carry with it the possession and vest the latter with it. And in like manner the sale and transfer of the goods by the assignee to the plaintiff, if made *bonâ fide*, would carry with it the possession of the goods to the plaintiff.

3. That the plaintiff, not having possession of the goods, cannot maintain this action.

Ans.—If it were so that plaintiff, at the time of the taking of the goods, had no possession, either actual or constructive, he could not maintain this action; but from the evidence if you should believe it, and consider the transaction free from actual fraud, the plaintiff would appear to have had at least the constructive possession, which would be sufficient to enable him to maintain this action.

4. That the amount of rent is to be deducted from any value of goods taken.

Ans. The court having refused to admit the evidence offered in respect to the rent, the jury have nothing to do with it.

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5. That the assignee had no right to sell before he made an inventory or appraisal, and had given security.

Ans. The inventory appears to be dated the day before the date of the sale of the goods; filed in the Prothonotary's office the day after; and the oath of the assignee made to the correctness of it on the 24th, the day after the date of the sale, when the bond with sureties for the faithful discharge of his duty as assignee was given. The sale would therefore seem to be valid in this respect, though the security was given afterwards.

6. That if there was any arrangement at time of assignment between Ruete and Dallam, plaintiff cannot recover.

Ans.—If there was any unfair arrangement or collusive understanding between Ruete and Dallam, in regard to the sale, it would avoid it as against creditors, and the plaintiff would not be entitled to recover; but without evidence showing such arrangement, it is not to be presumed, and if there be any evidence of it, I cannot perceive it.

The defendant excepted to the charge. A verdict was rendered for the plaintiff, and the defendant filed reasons for a new trial, which the court refused. The overruling of the defendant's points was now assigned as error.

H. M. Phillips, for the plaintiff in error, referred to *Leber v. Kauffelt*, (5 *Watts & Serg.* 440); *Mitchell v. Willock*, (2 *lb.* 253).

Gerhard and Randall, contra, were stopped by the court.

The opinion of the Court was delivered by

SERGEANT, J.—The principal point intended to be argued in this case has been very properly relinquished by the counsel for the defendant, as it was decided by this court, in *Fittler v. Maitland*, (5 *Watts & Serg.* 307), and previously, in the case of *Thompson v. Watmough*, there stated. It was held that retention of possession by the assignor, after making a voluntary assignment in trust for his creditors, and duly recorded, was not *per se* fraudulent, but that by reason of the publicity of the transaction, and its attendant circumstances, it stands on the same footing as a judicial sale, and that the title passes and continues in the assignee or his vendee, notwithstanding the goods are left in the hands and possession of the assignor, where there is no actual fraud or collusion. To this effect was the charge of Mr Justice KENNEDY in the present case, and therefore there was no error on this head.

Nor do we perceive anything in the next objection, that no possession was shown in the plaintiff. Constructive possession is sufficient to maintain trespass; and, under the evidence, such constructive possession in the vendee existed here. For the plaintiff's title drew with it the possession, it not being pretended that the

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assignor held the actual possession adversely : on the contrary, it is proved he held under the plaintiff, and for him.

It is further objected, that on the 23d August, when the assignee sold the goods to the plaintiff, he had not given bond with sureties, and therefore he could not convey a good title. The giving bond, however, does not seem, in this Act of Assembly, to be made a condition precedent to the assignee's acting, as it is in the Insolvent Act. It merely directs the assignee, in the first section, to file an inventory or schedule within thirty days in the office of the prothonotary, accompanied with an affidavit. By sect. 2, two appraisers are to be appointed by the court or a Judge in vacation, who are to return an inventory and appraisement. The fifth section then enacts that the assignees shall give bond "as soon as such inventory and appraisement shall have been filed." In the present case the inventory and appraisement were filed before the 23d August 1839, the day when the bill of sale was executed, and the bond was given and approved on the 24th August, the day following; so that the requisites of the Act seem to have been complied with. If an assignee neglects to file an inventory or give bond, the remedy seems to be, under the 11th and 23d sections, to cite him before the court to show cause why he should not be dismissed; but there is nothing in the Act which requires these preliminaries to be performed before the assignee can be qualified to act. On the contrary, it seems to contemplate that the title and power vest from the execution of the assignment, and that the assignee must be proceeded against for neglect of duty if he omits them.

As to the evidence offered by the defendant of the payment of rent out of the proceeds of the sheriff's sale, we are of opinion it was properly rejected. For although it is true that after the execution levied the landlord had a lien on the goods on the premises for the rent, yet that lien was produced by the defendant's own act, in issuing execution and levying on the goods, and if his levy was illegal, he cannot derive any advantage from the consequences it led to. That would enable him to take advantage of his own act. *Non constat* that these goods would ever have been distrained upon by the landlord for the rent, and, unless they were, he would have no lien upon them independently of the execution.

Judgment affirmed.

Green's Appeal.

Under the Act of 26th March 1827, the five years from the day of entry of a judgment, within which it must be revived by *scire facias*, are exclusive of the day on which the judgment was entered.

THIS was an appeal by Benjamin Green & Son from the decree of the Court of Common Pleas of *Northampton* county, distributing money in court. A judgment was entered up in that court on a bond and warrant of attorney by Philip Sholl against Reuben L. Seip on the 26th March 1836, No. 169 of January term 1836, and revived by agreement dated and filed March 26th 1841, No. 139 of January term 1841. On the 10th September 1840, No. 124 of August term 1840, a judgment was entered against Seip in favour of Benjamin Green & Son, which was revived to January term 1842, No. 165. B. Green & Son claimed to have their judgment first paid, on the ground that Sholl had lost his priority of lien, his judgment not having been revived in time. The court decreed that Sholl's judgment should be first paid; from which decree B. Green & Son took this appeal.

Maxwell, for the appellant. The lien of Sholl's judgment expired with the 25th March 1841. Where the limitation is of a certain number of years after a fact, the day of the fact is to be included. 2 *Chitt. Black. Com.* 100; 3 *East* 307; 3 *T. R.* 623; *Doug.* 463. If a present interest is to commence from a date, the day of the date is included. 4 *Wash. C. C. R.* 240; *Lysle v. Williams*, (15 *Serg. & Rawle* 137). The computation here is to be made from the act done, viz. the entry of the judgment. *Meason's Estate*, (4 *Watts* 344); *Dietrich's Appeal*, (*Ib.* 208). The design and object of the Act are to be regarded in construing the word "from." *Pugh v. Duke of Leeds*, (*Cowp.* 714); *Sims v. Hampton*, (1 *Serg. & Rawle* 413). In a question upon the necessity of a revival, this court gave a strict construction to the Act of 1827 in *Ebright v. The Bank*, (1 *Watts* 398).

Hepburn, contra. The Act of Assembly relates merely to time. It creates no interest, but only limits the lien of a judgment, which was before indefinite: and where that is the sole operation of an Act of Assembly, it is construed so as to exclude the day on which the act is done. This distinction is recognised in *Lysle v. Williams*, (15 *Serg. & Rawle* 135). The twenty days given by the Act of 1810 for an appeal, exclude the day on which the award is entered. *Sims v. Hampton*, (1 *Serg. & Rawle* 411). So in an

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appeal from the judgment of a justice of the peace. *Browne v. Browne*, (3 *Serg. & Rawle* 496). Whenever by a rule of court or an Act of the Legislature it is said an act may be done within a given number of days, the day on which the rule is taken or the decision made is excluded. *Goswiler's Estate*, (3 *P. R.* 201). The day of the date from which the time is computed is to be excluded. 11 *Mass.* 204; 5 *T. R.* 283; 2 *Inst.* 674; 1 *Pick.* 485. The distinction is where the computation is from an act done or from a day. 2 *Stark. Ev.* 1399 (782), title "Time"; 2 *Bro.* 15. The authorities cited by the other side are doubted in 2 *Chitt. Gen. Pr.* 69, note, which cites 15 *Vez.* 248; 9 *Barn. & Cress.* 134.

The opinion of the Court was delivered by

SERGEANT, J.—The question in this case is, whether the word "from," in the Act of Assembly of the 26th March 1827, relating to the duration of the lien of judgments, includes the day on which the judgment is entered or excludes it. The case of *Pugh v. Duke of Leeds*, (*Cowp.* 714), overthrew the prior cases that attempted to decide questions of this nature by verbal distinctions between the date and the day of the date, considering them as too subtle and scholastic to be applied to the practical business of life, and decided that "from" may be construed inclusive or exclusive, according to the design and object of the parties to a conveyance, and so as to give validity to acts done with the intention of being valid: and in that case "from" in a lease from the day of the date, was held to be exclusive. Where the word is used by the Legislature, there seems to be equal reason for rejecting minute verbal criticisms, and for resorting to something more reasonable and solid; and we think that where an Act of Assembly requires a thing to be done within a certain time from a prior date, (and perhaps also from a prior act), and the party by not doing it loses his right, as in limitation laws by which a right is to be taken away, there, in relief of the party, and to preserve him from loss, the most liberal construction ought to be chosen, and the furthest time given from which the reckoning is to be made. This principle has been adopted by this court in various cases cited by the counsel, of appeals from a court or justice, or an award of arbitrators, in which the party appealing has been allowed the time prescribed, excluding the day of the judgment or award; and it seems equally applicable to the present case.

Judgment affirmed.

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Read *against* Robinson.

Ordinarily chancery executes only a trust sufficiently formed to put the legal estate out of the grantor, or an agreement for a trust founded on a valuable consideration and not a mere voluntary one; and creditors are but volunteers.

A common law conveyance given to an agent for transmission to the grantee vests the title in the grantee forthwith, though ignorant of the transaction, and by his rejection of it the title reverts in the grantor.

Where one executed a voluntary assignment in Montgomery county for the benefit of creditors with preferences and handed it to his son to take to Philadelphia to a third person, who called with it on the assignee in Philadelphia and desired him to take it, but he refused to have anything to do with it; *held* that a presumption arose from the nature of the case that the deed was tendered by authority of the grantor.

In such case the Court of Common Pleas has power to substitute another trustee under the 23d section of the Act of 14th June 1836.

A deed of trust may be taken to be recorded by creditors for whose use the estate is conveyed by it, or any party interested in the trust.

ERROR to the District Court for the city and county of *Philadelphia*.

This was an action of trover and conversion brought by Thomas Read, assignee of Thomas Amies, against Samuel L. Robinson, executor of Amies.

The plaintiff offered in evidence a general assignment by Thomas Amies and wife of all his estate and effects to Joseph M. Thomas in trust for the benefit of creditors, dated 28th May 1839, and recorded 25th June 1839. The defendant objected to this offer on the ground that no evidence had been offered of the delivery of the assignment. The plaintiff then called Joseph Amies, who testified that he was one of the witnesses to the assignment. That Thomas Amies, who lived in Montgomery county, handed the assignment to him with instructions to take it to Philadelphia to one Wm. Ward, who had been making out his father's accounts. The assignor did not state for what purpose he was to give the assignment to Ward, but he supposed it was for the purpose of being given to the assignee. Witness accordingly came to town and gave the assignment to Ward. The assignor died June 3d 1839 and Ward in the winter of 1840.

The plaintiff then called Joseph M. Thomas, who testified, "I was acquainted with Thomas Amies. A few days before his death William Ward called on me—he held a paper in his hand—told me that Thomas Amies had made an assignment to me for the benefit of his creditors, and Ward wanted me to take the assignment, which he held in his hand. I know nothing of its contents, I did not take it to my hands. I did not examine it. I told him

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I was sorry Amies had made it to me, as it would give him the trouble of making it over again, that I could not attend to it—the estate was in another county and I would have nothing to do with it—I never did act in the assignment; Ward solicited me to act but I refused. Mr Dull, a considerable time after Amies' death, wanted me to go to Norristown about the business but I refused."

The plaintiff then gave in evidence the record of the Common Pleas of Montgomery county, by which it appeared that on the petition of Charles Dull, one of the creditors named in the assignment, setting forth the assignment and that after it was recorded J. M. Thomas had not acted under it, the court on the 18th Nov. 1839 issued a citation returnable on the 18th Dec., to Thomas to show cause why he should not be dismissed from the trust and others appointed in his stead; and on the return day ordered that he should be dismissed from the trust and appointed Thomas Read to execute the trust in his stead.

The plaintiff then gave in evidence a certified copy of the inventory and appraisement of the personal property of Thomas Amies, amounting to \$2468.30, made July 8th 1839 by the defendant as executor under his will made prior to the assignment.

A witness then testified that all the goods mentioned in the inventory were in the possession of Amies at the date of his assignment and remained on the premises after his death: that the defendant had possession of and sold them in July 1839 at auction, as executor of Amies' will. Witness never knew of any one acting under the assignment or taking possession of goods under it.

The plaintiff then again offered the assignment in evidence. The defendant objected to its admission on the ground that there was no proof of its delivery to Thomas, he having peremptorily refused to receive it as soon as its existence had been brought to his notice. The judge sustained the objection and ordered a nonsuit.

Errors assigned:

1. The court erred in rejecting the assignment when first offered.
2. In rejecting it when offered again, after the adduction of the parol testimony.
3. In directing the nonsuit.

This case was argued at this term by *Haly* and *Meredith*, for the plaintiff in error, and *Hare* and *Rawle*, for the defendants in error, and was now re-argued by

Meredith, for the plaintiff in error. The appointment of a new trustee was valid under the 23d section of the Act of 14th June 1836, the trustee named having refused to act. The objection is that the trust was not raised because the deed of assignment was never delivered. We answer, that by the assignment duly executed the estate passed from the assignor to the assignee, and that

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the only effect of the refusal was to divest it. This is the settled principle at common law. *Taw v. Bury*, (Dyer 167 b.); 1 *And.* 4; 2 *Leon.* 110; *Cro. Eliz.* 54; *Butler & Baker's Case*, (3 *Rep.* 26 b.); *Thompson v. Leach*, (2 *Ventr.* 201). In *Anon.* (*Clayton's Rep.* 31, pl. 53), it is decided that delivery to a stranger, though not expressly for the use of the grantee, is a good delivery. But chancery would relieve and would consider the estate vested, and if not, would supply a trustee and compel the trustee named to execute a conveyance. It will not allow a trust to fail for want of a trustee, nor permit a trustee to defeat the trust by his dissent. *Rep. temp. Finch* 258; *Ingram v. Porter*, (4 *McCord* 198); *King v. Donnelly*, (5 *Paige* 46); *Methodist Church v. Jaques*, (1 *Johns. Ch.* 450); *Jaques v. Methodist Church*, (17 *Johns.* 548); *Nicoll v. Mumford*, (4 *Johns. Ch.* 525); *Cumberland v. Codrington*, (3 *Ib.* 261); *McKinney v. Rhoads*, (5 *Watts* 343).

Rawle, contra, contended that this was not such a trust as chancery would interfere with to furnish a trustee, being merely a voluntary assignment, *Jerem. Eq.* 20; *Lewin on Trusts* 110; especially where the plaintiff claims preferences, and the defendant as executor for general distribution among all the creditors. Then at law there is no delivery till acceptance by the grantee, nor does the estate pass from the grantor till the grantee assents. 1 *Johns. Cas.* 536; *Jackson v. Phipps*, (12 *Johns.* 418); *Verplank v. Sterry*, (*Ib.* 536); *Chess v. Chess*, (1 *P. R.* 32); *Maynard v. Maynard*, (10 *Mass.* 456); *Shep. Touch.* 57. It cannot be pretended there was any delivery here to the assignee, for Ward had no instructions from the assignor, and what he did was a nullity. *Sailor v. Hertzog*, (4 *Whart.* 259).

The opinion of the Court was delivered by

GIBSON, C. J.—The ordinary power of a chancellor extends no further than the execution of a trust sufficiently formed to put the legal title out of the grantor; or to the execution of an agreement for a trust founded on a valuable consideration. Such was the doctrine of Lord ELDON in *Ex parte Pye*, (18 *Vez.* 140); *Ellison v. Ellison*, (6 *Vez.* 662); and *Pulvertoft v. Pulvertoft*, (18 *Vez.* 99); and such too was the doctrine of Sir William GRANT, in *Antrobus v. Smith*, (12 *Vez.* 39); and *Sloane v. Cadogan*, (*Sugd. Vend. App. No.* 26). According to *Twelves v. Williams*, (3 *Whart.* 485), equity would not execute this assignment as an agreement, because the creditors are volunteers; but the doctrine maintained by the masterly argument of Justice VENTRIS, in *Thompson v. Leach*, (2 *Vent.* 201), and eventually established by the decision of that case in the House of Lords, is that a common law conveyance put into the hands of an agent for transmission to the grantee, takes effect the instant it is parted with, and vests the title though the grantee be ignorant of the transaction; and that the rejection

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of such a grant has the effect of revesting the title in the grantor, it would seem, by a species of remitter. On this ground a chancellor would support the trust before us as sufficiently complete in its creation. The difficulty is to comprehend how the remitter can take effect without displacing intermediate interests springing from the rejected deed; but the authorities conclusively prove that it may. VENTRIS refers to Lord COKE's solution (1 *Inst.* 356 *b*) of a difficulty started by LITTLETON, (*Sect.* 677), in regard to a husband's disagreement to a conveyance back to a wife of her discontinued estate, which is held not to intercept the remitter of the wife to her former title; "and the true reason," said VENTRIS, "is because she is in of a title paramount to the conveyance to which the disagreement relates." But how does she get back to her paramount title? If the husband's disagreement to the conveyance from the discontinuee, sweeps the estate which passed by it clean out of her by relation to the date of the deed, there can be no wrongful estate in her from which she may be remitted to her rightful one; and that the remitter can nevertheless be accomplished in the mean time, proves that intermediate interests may fasten on the title which it is not in the power of the grantee's disagreement to unclasp. And in accordance with this principle *Thompson v. Leach* was finally determined. A deed of surrender by tenant for life, to a person in remainder, was held to bar intermediate contingent remainders, though the deed was disagreed to by the grantee, because it had in the mean time united the particular estate to a remainder, which though posterior in the order of vesting in interests, thus became prior in time as to vesting in possession; and because the two estates being once reunited, could never afterwards be disjoined. Apply the doctrine to the case before us. By the transmission of the deed for acceptance to the assignee, the title instantly passed at law and the trust took effect. How then could the equitable interest of the creditors, who were the only persons beneficially interested, be devastated by the disagreement of the assignee in this case, more than could the legal estate of the wife, or that of the remainder-man in the cases cited? Equity ever protects, where it can without disturbing a legal right, the interest of a *cestui que trust* from the acts of the trustee; and it would doubtless support the trust before us as being sufficiently created.

But our statute would sustain it even if a chancellor would not. The Act of 1836 provides that the several courts having jurisdiction, shall have power to appoint assignees or trustees "where any sole assignee or trustee shall *renounce* the trust, or refuse to act under or wholly execute the same." Now a trust depending for its existence on the assent of the trustee to the grant in which it is declared, is, when renounced, in the very category defined in the first member of the clause; for it is a rule, to which there is said to be no exception, that there is no renunciation after accept-

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ance, and consequently after assent to the grant of the legal estate. In *Chalmer v. Bradley*, (1 Jac. & W. 68), it was held that a trustee cannot renounce, having assented to the trust; and the same principle is to be found in *Doyle v. Blake*, (2 Sch. & L. 231), and *Ried v. Truelove*, (Amb. 417). If, having assented to it, he refuse to act under it, or wholly execute it, he falls within the provision made by the second member of the clause. There is no middle ground between renunciation and acceptance; and part of the statute would be inoperative did it not act on a case like the present.

But to constitute renunciation, there must be an express rejection or a tacit refusal to act; for there can be no renunciation where the assignee is ignorant of the existence of the paper. Was he ignorant of it in this case? The instrument was put into the hands of Joseph Amies, to be handed to Ward, who tendered it to the assignee, and it was rejected. According to the *Touchstone*, page 75, the naked deposit of a sealed instrument for no declared purpose, is not a delivery of it; and it might perhaps not be a tender to the grantee within the statute, did it require one. But here there was a purpose declared; and when we find the depositary handing the paper to the person to whom it was sent by the assignor, and that person presenting it to the assignee, a presumption arises from the nature of the case, that the tender was made by authority communicated through some channel which does not appear. The statute, however, does not call for a tender by authority: it is satisfied when there has been an express renunciation in fact, and for that reason the assignment ought to have gone to the jury.

The objection to the recording is unfounded. It was certainly competent for a party interested in the trust, to take the necessary steps to have it executed.

Judgment reversed, and *procedendo* awarded.

Morgan against Moody.

The landlord is entitled to his rent where the tenant's goods are removed from the premises by the constable, under attachments issued pursuant to the 27th and 28th sections of the Act of 12th July 1842, and are afterwards sold by execution on the judgments of the plaintiffs.

ERROR to the District Court for the city and county of Philadelphia.

William H. Morgan against David Moody. Case stated.

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Elijah Gleason, Jr., rented from the plaintiff the store and premises No. 279 Market Street, on the 10th October 1842 for the sum of \$800 per annum, payable quarterly. On the 6th December 1842 the goods of Gleason on the premises, were removed therefrom by the defendant, by virtue of various attachments issued against Gleason by his creditors, under the provisions of the 27th and following sections of the Act passed July 12th 1842 entitled "an Act to abolish imprisonment for debt, and to punish fraudulent debtors;" the defendant being the constable to whom said process was directed. Said goods so taken under the said attachments, have been sold by the defendant by virtue of the proceedings therein. Immediately upon the removal of said goods, notice was given to the defendant that rent was claimed by the plaintiff from the said 10th October 1842 to the time of removal of said goods, and a farther notice of the same kind was given to the defendant after the sale of said goods, which took place under the said proceedings, and before he parted with the money.

If the court should be of opinion that the plaintiff is entitled to recover, then judgment to be entered in favour of the plaintiff for \$123.69; if otherwise, then judgment to be entered for the defendant.

The court below gave judgment for the defendant, which was now assigned for error.

Lex, for the plaintiff in error, contended that the landlord was entitled to his rent up to the time of the removal of the goods, under the attachments issued by virtue of the 27th and 28th sections of the act of 12th July 1842. The latter section directs that it shall be served by the constable by attaching so much of the defendant's property (not exempt by law from sale upon execution) as will be sufficient to pay the debt demanded; and section 29 makes it his duty to take the property into his possession unless bond is given. By section 32, execution is levied on the property attached. Here the goods were on the premises when attached, and were removed afterwards and sold by execution. The case falls within the equity of the 83d section of the Act of the 13th June 1836 relative to executions, by which the goods and chattels being in and upon any messuage, lands or tenements demised, taken by virtue of an execution and liable to the distress of the landlord, are made liable for the payment of any sums due for rent at the time. The point seems to be decided in *Pierce v. Scott*, (4 Watts & Serg. 344).

H. M. Phillips, contra. The question is whether the landlord can consider the execution as relating to the time of the attachment: and we contend he cannot. The Act of the 13th June 1836 does not authorize it, and there is no other act on the subject. These attachments were only mesne process, and after judgment the levy was made, and it was only then the landlord's

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right accrued, but the goods were off the premises. He referred to 1 *Ashm.* 147.

The opinion of the Court was delivered by

ROGERS, J.—The landlord is entitled to payment of rent up to the day the goods are taken in execution, though it be in the middle of the quarter. *West v. Sink*, (2 *Yeates* 274); *Binns v. Hudson*, (5 *Binn.* 505). And in this respect the 83d section of the Act of 16th June 1836 on which this point arises, makes no change; so that the fact that the rent was not due cannot vary the case. The question is, whether where an attachment is issued and the goods are sold by the sheriff or constable off the demised premises, the landlord is entitled to be paid his rent out of the proceeds of sale. The former act, of which this is a transcript, has always received a liberal construction, as for example, in the cases above cited, which do not fall within the letter, although it is there held they are embraced by the spirit of the act. To apply the same mode of construction to the words “an execution,” and this case comes within the reason of the enactment. And this would seem to be the opinion of the Chief Justice, in *Pierce v. Scott*, (4 *Watts & Serg.* 343). The process of outlawry, as is there said, is considered as a species of execution at the suit of the subject, and foreign attachment, being a process to compel the defendant to appear to an action, is also a species of execution; and when the sheriff proceeds to sell the property in satisfaction of the debt, it must be considered as one process, and in the nature of execution. An execution is the means whereby the sentence of the law is put in force, and is performed in different manners, according to the nature of the action. 3 *Blac. C.* 412; 2 *Jacob's Law Dic.*, title “Execution” 483. It is therefore doing but little violence even to the words of the Act, much less to the spirit, to hold that an attachment resulting in the sale of the goods pledged to the landlord for his rent, is “an execution” within the terms of the Act. It surely can make no difference that the goods were removed from the demised premises, as that may be the case where sold on a *fieri facias*, and yet that has never been supposed to affect the right of the landlord to his rent. The Act has reference to the goods and chattels on the premises at the time the execution is issued, and levy made, and not at the time of sale. The words “liable to the distress of the landlord,” cannot affect this question; none other, of course, are pledged for the rent, and all such articles as have been by various Acts of Assembly exempted from distress, are excluded. It is a mistake to suppose that a liberal construction of these Acts is for the benefit of the landlord alone. It is of equal if not greater service to the tenant, who is thereby, in consequence of the security arising from the goods, enabled to obtain a shelter for his family on more easy and advantageous terms.

Judgment reversed, and judgment for plaintiff.

Weinberger *against* Shelly.

In an action for malicious prosecution, the want of an averment in the narr. that the prosecution was carried on without probable cause, is cured by verdict, especially where it appears that evidence was given tending to prove a want of probable cause, and the court charged the jury that they should find for the defendant, unless they should believe that the prosecution had not only been carried on maliciously but likewise without probable cause.

Probable cause is, perhaps, a mixed question of fact and law; and where the facts are contested, the court should leave them to the jury with instructions as to what in law is probable cause.

The verdict cures the want of an allegation in the narr. that the prosecution was at an end, where it states an indictment returned "*ignoramus*."

ERROR to the Common Pleas of *Bucks* county, in an action on the case for malicious prosecution, brought by Peter Shelly against Samuel Weinberger, in which a verdict and judgment were rendered for the plaintiff. The declaration complained that "Samuel Weinberger minding and most wickedly intending him, the said Peter, most unjustly to damnify, oppress and impoverish, at a Court of General Quarter Sessions, held for Bucks county aforesaid, at the Court House in Doylestown, in said county, the 10th day of December 1839, before John Fox, Esquire, President Judge, and his Associates, the justices of the said court, the peace in the county aforesaid to keep, and divers felonies and other malfeasances in said county perpetrated to hear and determine, assigned, being a certain bill of indictment for larceny, containing the following false matter, to wit: (reciting the indictment) against him the said Peter, (together with a certain Charles Beidler) falsely and maliciously did cause to be written: which same bill of indictment, being so written, the said Samuel to the justices aforesaid did cause and procure to be exhibited, and that bill by the same justices to be exhibited to the jurors of the Grand Inquest, in due and legal manner sworn or affirmed, and charged to inquire for the said county, &c., and the body of the county aforesaid, by the same jurors to be inquired of and the truth whereof to the justices aforesaid by the same jurors to be presented, falsely and maliciously did cause and procure, and the said Samuel the jurors aforesaid to find and present, that that bill of indictment was a true bill, then and there falsely and maliciously did labour. Which same jurors after a diligent inquiry of the matter in the bill of indictment aforesaid laid and contained, upon the back of the said bill did endorse and present to the justices aforesaid, that they were ignorant thereof, or in other words, "*ignoramus*." By pretext of which premises the said Peter,

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divers great sums of money to expend, to wit: \$100 for the procuring of counsel in his defence, besides other large sums of money in about said defence necessarily incurred, and divers troubles and labours to undergo, was compelled, and also in transacting several his honest and lawful affairs and business was greatly hindered. Wherefore, he saith he is worse and hath damage, \$2000. And, therefore, he brings this suit, &c."

The defendant pleaded not guilty. The whole evidence, which was voluminous, was brought up with the record. The following charge of the court contains all of it that is material;

"This is a special action on the case for malicious prosecution. The outline of the case is: Weinberger was the owner of a cow, Beidler wanted that cow. On the one side it is contended that Weinberger sold the cow to Beidler; on the other it is denied. On this subject you have heard the evidence and it is submitted to you. Beidler and Shelly, the plaintiff, drove off the cow, Beidler having sold the cow to Shelly, to whom he swears he was \$20 in debt. You have heard how Shelly took the cow home and how Weinberger obtained her, how Weinberger stated his case to 'Squire Clymer, how the 'Squire proceeded, applied to Wright the Deputy Attorney General for information, how he wrote to him and how Shelly was finally bound over and a bill sent to the Grand Jury which was returned 'ignoramus.' This is a mere outline. You will attend to the detail of the whole evidence given and you are its judges. From the whole of the evidence has the plaintiff made out such a case as to entitle him to a verdict? Has he proved malice in the proceeding of the defendant in binding over the plaintiff and presenting the case to the Grand Jury, and was there a want of probable cause? The plaintiff must prove both to entitle him to a verdict. Now as to *malice*, the inquiry on that subject is for the jury. It belongs not to the court. It is the peculiar province of the jury; to you it belongs. It is to be collected from all the facts and circumstances proved. Probable cause has been considered a mixed question of law and fact. It is the duty of the jury to judge of the facts proved, to weigh the circumstances, to inquire into the truth of the evidence. This court cannot do better than to express themselves in the language of Judge *Washington*, in *Munns v. Dupont*, 'That actions of this kind for malicious prosecution are of a very delicate nature. On the one hand if they are too much encouraged, there is great danger, not only that individuals engaged in the prosecution of criminal charges may suffer injury, but that the public may suffer much more.' The Commonwealth acts by the agency of private individuals, her sworn Deputy Attorney General, who conducts the legal proceedings after the charge is brought before the court. In prosecutions instituted for offences against individuals, somebody first prosecutes; but if actions for malicious prosecutions be too much encouraged, who will give information without insurance

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against damage? The consequence would be that few offences would be prosecuted or punished. On the other hand, if a proper degree of encouragement is not given to suits of this nature; if, on a slight or unfounded suspicion, a person is to be prosecuted criminally; his fame, his liberty and property may be sacrificed and the injured party can obtain no redress; therefore a proper degree of attention ought to be paid by a jury to the respective rights of both parties. The plaintiff in such cases must prove that his prosecution was influenced by malicious motives, and the jury must be satisfied of such being the truth, and that the prosecution was without probable cause, before they give a verdict for the plaintiff. If malice is proved, it is not enough; it must be shown that there was want of probable cause to suspect the person charged. If probable cause is shown, notwithstanding the jury may presume malice, yet that will not be sufficient to justify a verdict for damages. What is probable cause? It has been defined to be the 'existence of circumstances and facts sufficiently strong to excite in a reasonable mind suspicion that the person charged with having been guilty was guilty.' If Shelly by his folly or fraud exposed himself to a well-grounded suspicion that he was guilty, the prosecution was founded on probable cause.

Before we proceed further in our instructions to you, we will dispose of the defendant's points.

1. That if the defendant had any reasonable ground for the prosecution, the verdict must be for the defendant.

2. That if the jury believe the witnesses for the defendant, there was probable cause for the prosecution and therefore there must be a verdict for the defendant.

3. That in this action it is not necessary for the defendant to fix larceny upon the plaintiff. If by the plaintiff's folly or fraud he exposed himself to a well-grounded suspicion that he was guilty, the prosecution is founded on probable cause and the verdict must be for the defendant.

We answer these three points together. We believe they are already substantially answered. We have and do instruct the jury that to sustain this action, there must be a want of probable cause. If the case rested on the defendants' witnesses alone, we think there would be probable cause; but the court and jury in deciding whether there was probable cause, must take into consideration the whole evidence. We agree it is not necessary for the defendant to fix larceny upon the plaintiff; and we have instructed you that if the plaintiff by his folly or fraud exposed himself to a well-grounded suspicion that he was guilty, the prosecution is founded on probable cause.

4. If the jury believe that the defendant made a fair statement of the facts of the case to the Deputy Attorney General, who upon that gave such directions to the justice of the peace as

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induced him to bind the plaintiff over, the verdict must be for the defendant.

5. If upon a fair statement of the facts by the defendant to the Attorney General, he (the Attorney General) gave the magistrate instructions to bind the plaintiff over, the verdict must be for the defendant.

7. That if the jury believe that the defendant made the charge against the plaintiff before the justice of the peace, fairly stated the facts and conceived that it amounted to larceny, and the prosecution was then carried on by direction of the officers of the Commonwealth, the verdict must be for the defendant.

9. If the prosecution was continued by direction of the Attorney General after it was commenced, the bill of indictment must be considered as having been sent by him in his official character and that the defendant had no control over it, the verdict must be for the defendant.

10. If the facts were fairly stated to the Deputy Attorney General, and upon such statement he directed the parties to be bound over or gave such direction as induced the justice to bind over, it is conclusive evidence of probable cause and the verdict must be for the defendant.

These five points embrace the same subject matter, and the court will answer them together. We agree if the defendant made a fair statement to the magistrate and the Deputy Attorney General, and these law officers of the State proceeded on that statement and the defendant believed it was larceny and the officers took charge of the case, the defendant will be entitled to a verdict. We have already instructed you that to support this action, the jury must be satisfied the defendant acted maliciously. We instruct you that when a person makes an honest statement of an alleged offence having been committed, to the proper officers of the law and they take up the prosecution, he will not be liable to an action for a malicious prosecution.

6. That in order to recover in this cause, the plaintiff must prove both malice and want of probable cause, and if malice be proved, still the defendant must have a verdict, unless want of probable cause be also shown.

8. If there was probable cause at the time the bill of indictment was sent to the Grand Jury, the verdict must be for the defendant, whether there were probable cause or not at the commencement of the prosecution.

12. From the want of probable cause malice may be inferred, but to justify such an inference the evidence of want of probable cause must be clearly made out.

13. Innocence of the plaintiff is no ground to support the action, if there be either probable cause or no malice proved.

15. Slight evidence of probable cause is sufficient evidence to prevent a verdict against the defendant.

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16. Whether there is probable cause is a question of law to be decided by the court. From the uncontradicted testimony in the cause probable cause is shown in this case.

We think all these points are fully answered. We have instructed you that the plaintiff must prove, to entitle him to a verdict, malice and want of probable cause; that malice is a question of fact, and that probable cause is a mixed question of law and fact; that when the jury find the facts in a certain way, then the law arises and the court declare it. As there is but one count in the plaintiff's declaration, we agree if there was probable cause when the bill was sent up, the plaintiff ought not to recover. Our general charge and our answers to other particular points in connexion with this answer, fully answer these points.

11. If from the evidence the jury should believe that the plaintiff knew the cow belonged to the defendant, and with a view fraudulently to obtain the possession of her, contrived with Beidler to have her secretly driven from the field of the defendant when he knew he was absent from home, it would be larceny and the verdict must be for the defendant.

If the facts warranted this point, it might possibly be larceny, if a jury found a felonious intent. Such facts, if found by a jury, would be clear probable cause and would clearly entitle the defendant to a verdict. We do not think the evidence warrants the point, because the cow was driven off in open day.

14. The paper given in evidence varies from that set out in the indictment.

17. That the plaintiff was bound to show that the prosecution was at an end and that the party had been regularly discharged by order of the court.

18. That the plaintiff cannot recover under the narr., as it does not state the defendant was acquitted.

19. That the narr. avers the indictment to have been preferred in the court of General Quarter Sessions, a court which has no existence.

Some of these objections are at least hypercritical. No objection was made to the evidence on the ground of a defective declaration until the counsel began to address the jury nor was it read until then; by the paper given in evidence is, we believe, meant the indictment. There was no objection of this kind taken to its being read. The indictment shows that it was found 'ignoramus,' and we think it is sufficiently shown that it was an evidence of the prosecution. We deem the narr. sufficient and there is nothing in the 19th exception. We therefore dismiss these technicalities and put the case to you on its merits.

The plaintiff insists that the bill being thrown out by the Grand Jury is sufficient evidence of the want of probable cause in the defendant. The bill being thrown out is an inference of the want of probable cause. We do not deem it sufficient of itself to sup-

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port the action. There must be shown by the plaintiff other evidence of want of probable cause. The law requires that the defendant should have reasonable ground of suspecting the plaintiff at the time he continued the prosecution by indictment; or malice will be imputed when there is no probable cause. In this cause if you are satisfied that the defendant had reasonable ground to suspect the plaintiff and he brought that upon himself by his folly or fraud, and the defendant did act truly in stating the case to the officers of the law and acted under their directions, although we are clearly of opinion there was no larceny, your verdict should be for the defendant."

The defendant excepted to the charge.

Errors assigned:

1. The court erred in entering judgment for the plaintiff.
2. They should have charged that there was probable cause shown, and should have directed a verdict for the defendant.

J. Fox and Wright, for the plaintiff in error, contended that the court was bound to determine whether or not there was probable cause; they cannot leave it to the jury. Well-grounded suspicion is probable cause, and that existed here. 2 *Wend.* 424; 1 *Ibid.* 140, 345; 8 *Cow.* 142. Besides, the narr. is defective in not stating that the prosecution was without probable cause; that being the ground of the action. 2 *Penn. Black.* 524; 2 *Chitt. Pl.* 297, note; *Oliver's Prec.* 377. Again, alleging that ignoramus was returned, is not sufficient; there must be a discharge by the court to maintain malicious prosecution. 1 *Nott & M'Cord* 36; 2 *Ibid.* 143; 4 *Greenl.* 226, cited *Selw. N. P.* 256; 2 *Yeates* 475.

Chapman, contra. The court below properly charged, that on the defendant's evidence there was probable cause, but not on the plaintiff's. It is their duty, where the evidence is doubtful, to leave it to the jury. 4 *Munf.* 59. As to the declaration, it was copied from Read's Precedents, and no averment of the want of probable cause is made in declarations where the ground of suit is preferring a bill of indictment which is returned ignoramus: for the onus of showing probable cause is then thrown on the defendant. So of a discharge by the magistrate after arrest. 2 *Murphy* 248; 2 *Johns.* 203. By the plea and going to trial this objection was waived. 6 *Binn.* 28; 2 *Cro.* 370; *Cro. Car.* 288; 3 *Vin. Ab.* 12; 1 *Chitt. Pl.* 402. In conspiracy, the words "probable cause" were omitted, yet the narr. was held good. 1 *Binn.* 174.

The opinion of the Court was delivered by

KENNEDY, J.—Action on the case, brought by the defendant in error against the plaintiff in error, for a malicious prosecution. First, it is alleged that the court below erred because they did not charge the jury that probable cause was shown, and that there-

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fore they ought to find for the defendant. It appears to us that if the court had so charged the jury, they would have erred: for evidence was given on the part of the plaintiff, tending to show that the defendant had determined on prosecuting the plaintiff for stealing the cow, whether there was probable cause or not for so doing, and that the defendant, from his knowledge of the circumstances attending the taking of the cow, had no reason to believe that she was stolen or taken feloniously. Probable cause is a mixed question of law and fact; and as often as the facts in relation thereto are contested, they must be decided by the jury, and if found to exist, it remains for the court to instruct the jury whether or not, in law, they amount to probable cause. *Munns v. Dupont*, (3 Wash. C. C. 31). Whether the facts and circumstances showing the existence of probable cause, in this case, were true or not, was a matter seriously contested; so that the court did right in referring them to the jury, and, at the same time, instructing them, as they did, what was necessary to be found in order to establish probable cause, in law.

Secondly, it is alleged that the declaration contains no averment that the prosecution was commenced and carried on without probable cause. This omission would doubtless have been fatal on demurrer, but is it not cured by the verdict? Sergeant WILLIAMS, in his note to *Stennel v. Hogg*, (1 Saund. 296 a), lays down the following rule, in support of which he there cites a great many authorities. "Where there is any defect, imperfection or omission in any pleading, whether in *substance* or form, which would have been a fatal objection upon demurrer, yet if the issue joined be such as necessarily required on the trial proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the Judge would direct the jury to give or the jury would have given the verdict, such defect, imperfection or omission is cured by the verdict by the common law; or, in the phrase often used upon the occasion, such defect is not *any jeofail* after verdict." And accordingly it was ruled by this court, in *Carson v. Hood's Ex'rs.*, (4 Dall. 108), that after verdict it will be presumed everything was done at the trial which was necessary to support the action, unless the contrary appears on the record. But in the case before us, the aid of such presumption can scarcely be said to be needed; for the bill of exception taken to the charge of the court, which was delivered to the jury, has made the same a part of the record, and from it it appears that evidence tending to prove a want of probable cause was given, and that the jury were expressly instructed by the court, that unless they should be of opinion from the evidence that the prosecution had not only been commenced and carried on maliciously, but likewise without probable cause, their verdict ought to be in favour of the defendant below. It therefore may be said to appear from the record itself of the cause, that the question whether there was

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reasonable and probable cause for the prosecution or not, was submitted to, and passed on by the jury, under the requisite instruction given in relation thereto by the court.

Again, it has been alleged for error that it is not averred in the declaration that the prosecution was at an end. It is alleged in the declaration that the grand jury ignored the bill of indictment, or returned thereon "ignoramus." But even admitting this to be insufficient to show that the prosecution was at an end, which is going further than would seem to be reasonable, the verdict being for the plaintiff below, the necessary inference is that it was proved on the trial that the original prosecution was at an end. *Vide* Sergeant Williams's note (1) to *Stennel v. Hogg*, (1 *Saund. Rep.* 228 a).

Judgment affirmed.

Drexel *against* Man.

On a writ of error the Supreme Court inquires judicially only into points raised by the record.

If by the transcript of a magistrate's judgment, filed in the Court of Common Pleas, it appears that execution was issued and returned "no goods and defendant not found," it is sufficient to warrant a *feri facias*, without filing a certificate.

A grantor is not entitled to mesne profits after conveyance, and therefore there is no objection on that ground to his competency as a witness for the plaintiff, his grantee.

Where the ground of objection to a witness's competency is assigned in the bill of exception, no other can be taken on the argument in error.

It is not error for the court to charge, where a notice was given at a sheriff's sale, that if only one notice was given, and that was given by another person without the knowledge, direction or interference of the plaintiff's grantor (who was the purchaser), he could not be affected by it.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in which an ejectment was brought by Daniel Man, Jr., against Francis M. Drexel, to recover a lot of ground in the district of Kensington, and 40 two story houses erected thereon, and a verdict and judgment rendered for the plaintiff.

The plaintiff claimed this property by virtue of a sheriff's sale and deed to Daniel Man, Sr., as the property of Dr Dyott, and a conveyance from Daniel Man, Sr., to the plaintiff, on the 2d February 1843. The defendant impeached this sheriff's sale on various grounds, which it is unnecessary to state, as they were not brought up by the bills of exception, or decided on by the court. All that was brought up by the record, and relied upon by the plaintiff in error on the argument, was as follows :

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The plaintiff gave in evidence the exemplification of the record of the Common Pleas of Philadelphia county, in the case of *Brooks v. Dyott*, a transcript of which was filed in that court, by which it appeared that Wm. L. Brooks obtained judgment against T. W. Dyott, on the 1st June 1837 before a magistrate, for \$15.38 and costs. It then went on to state "execution issued 22d October 1838. Tonkin Const. Exec. ret. 'No goods and deft. not found.'" The docket of the Common Pleas (the judgment being there marked to the use of H. B. Pennock) stated "*fi. fa.* to Dec. '38, November 22d 1838." The plaintiff then offered in evidence a deed from the sheriff to Daniel Man, for the premises, reciting a sale under the judgment and execution. To this the defendant objected, 1. That the exemplification showed that the proceedings were irregular and illegal, viz: in this; the summons was issued October 2d 1839, returnable October 8, on which day judgment was entered, and October 22d *fieri facias* and *capias ad satisfac.* were issued, to which the returns were "no goods and defendant not found." 2. That when the execution issued from the Common Pleas, no certificate, as required by the 10th section of the act of 20th March 1810, was produced. The court overruled the objections and the defendant excepted.

The defendant gave in evidence a paper read by the sheriff at the sheriff's sale, handed to him by Mr. Pennock, stating that the property was sold subject to a mortgage of \$8000, dated Sept. 5th 1828 and interest, and another of \$8000, dated August 6th 1830 with interest, which the defendant contended was a misrepresentation, and calculated to deceive purchasers, as there was much less interest then due, and that Daniel Man, Sr. was a party to the giving of this notice.

The plaintiff in reply called Daniel Man, Sr. The defendant objected to him as a witness, on the ground of his being interested in this, viz: that he was entitled to the mesne profits for one day, between February 2d and February 3d 1843. The plaintiff produced a release to himself from the witness. The defendant again objected, but the court admitted the witness and sealed an exception.

The whole of the charge contained in the record was as follows:

"And thereupon the learned judge, amongst other things, charged the jury as follows: 'That if they should find that but one notice was given at the sheriff's sale, and that this was given by Mr. Pennock, without the knowledge, direction or interference of Captain Man, Man would not be affected by it.'"

To this charge the defendant excepted.

St George Campbell and *Jack*, for the plaintiff in error.
Randall and *Dallas*, contra.

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The opinion of the Court was delivered by

SERGEANT, J.—As this court does not, upon a writ of error, sit to try the merits of the case, but merely those points which are raised by the record, a great part of the argument in this case has been wasted on matters concerning which this court cannot judicially enquire, because they do not appear upon the record. To these alone can our attention be directed, and if there are others that are really material to the party, they ought to have been made to appear in such a shape that we could regularly take notice of them.

All the errors assigned have been waived except three; the two first appear in the bills of exception, and the last is to the charge of the court.

1. The first of these errors is in the admission of the record in the case of *Brooks v. Dyott*. It was upon this judgment that the sheriff's sale of the premises took place, under which the plaintiff holds his title. The objection made to this record is that the *feri facias* was void, because it was issued on a judgment recovered by Brooks before a magistrate, the transcript of which was filed in the office of the Prothonotary of the Court of Common Pleas, and no certificate of the magistrate was filed, such as the Act of Assembly requires, namely: that an execution had been issued by the magistrate to which there had been a return of *nulla bona*. But we think there is no weight in this objection, for all that is required by the Act of Assembly does appear in the transcript certified and filed. It is there stated, that execution issued on the 22d October 1838 and was returned "no goods and defendant not found." Where the judgment alone is first filed, it will be necessary to give another certificate that the magistrate subsequently issued execution; but where that is done before the transcript filed, and so appears in the transcript, it is in substance the same thing, and this we believe is the usual practice.

2. The 2d error is in admitting Daniel Man as a witness. He was the purchaser at sheriff's sale, and obtained possession, but was turned out of it by the present defendant (after a recovery in ejectment) by a *habere facias possessionem*, in January 1843. On the 2d February 1843, Daniel Man, Sr. conveyed the premises in fee to the present plaintiff Daniel Man, Jr. When Daniel Man, Sr. was offered as a witness for the plaintiff, the defendant objected to him on the ground that he was entitled to the mesne profits for one day, viz: between the 2d and the 3d February 1843. There must have been some misconception or mistake in the defendant, in the statement of this objection; for it is plain he could not have any interest in the mesne profits on the day specified, having conveyed away all his estate in the houses. Other reasons have been given here, and much argument on the rights of Daniel Man, Sr. to the mesne profits, from the time that intervened between his dispossession by the sheriff, and his conveyance to his

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son, but we think that the plaintiff in error is not at liberty to travel beyond the reason assigned and appearing on the record. He chose to confine himself to that, and he must be bound by it. It would be unfair to reverse the decision of the court below, for objections that, for aught we know, were never made, and which, if they had been made, the other side might have obviated, or have waived the evidence. On them, therefore, we give no opinion. We can only notice the one relied on, and that we think untenable.

3. A point has been much insisted on here, which is liable to the same remark: that Daniel Man, Sr. was guilty of fraud at the sheriff's sale under which he purchased, in relation to a certain notice promulgated at the sale by Mr Pennock. The purport of this notice was, that the sale was made subject to a mortgage of \$8000, dated September 5th 1828, and interest, and another of \$8000, dated August 6th 1830, with interest. Whereas the plaintiff in error alleges that a considerable portion of this interest had been paid off, and that the mortgage debts were therefore much less than by this notice they appeared to be. All that we find on the record is, that the court, among other things, charged the jury that if they should find but one notice was given at the sheriff's sale, and that this was given by Mr. Pennock, without the knowledge, direction or interference of Capt. Man, Man could not be affected by it. In this we see no error. Whether the notice if given by Daniel Man, would make him guilty of such fraud as would render void the sale—what particular conduct or act of his own, or another, would make him a participator in it, are questions not raised here; and whether they were put by the plaintiff in error on the trial, and answered by the court, we cannot tell, and cannot therefore notice them. On the whole record we perceive no error, and are of opinion that the judgment be affirmed.

Judgment affirmed.

Jacobs *against* Featherstone.

There is no feme sole trading in Pennsylvania but such as falls within the Act of 1718.

Where the husband lives in the same city as the wife and the wife contracts debts for shopkeeping, and the husband and wife are living separate, the husband and wife are not suable.

Even if they were necessities furnished, and the husband were liable, the wife cannot be joined as defendant in the suit.

[Jacobs v. Featherstone.]

ERROR to the District Court for the city and county of *Philadelphia*.

The plaintiffs, Samuel Jacobs & Robert W. Cushman, complained in the first count of their declaration, which was for goods sold and delivered, that "Michael Featherstone and Hannah his wife, (which said Hannah doth merchandise and trade with merchandise in the art of a dry-goods shopkeeper, according to the custom of feme sole trading), were attached to answer Samuel Jacobs & Robert W. Cushman of a plea of trespass upon the case, &c. For that whereas the said Hannah (then and now being the wife of the said Michael Featherstone, and then and now trading and merchandising in the art aforesaid alone, and without her said husband, according to the said custom of feme sole trading), on the 1st day of," &c. There were other common counts, and the narr. concluded against Hannah Featherstone, and stated the damages thus: "yet the said Hannah hath disregarded her said promises," &c.

Michael pleaded *non assumpsit* and payment, and Hannah, in person, pleaded coverture in abatement, and also, "for a further plea in this behalf the said defendant, Hannah Featherstone, in person, comes and defends the wrong and injury, when, &c., and says that the plaintiffs ought not to have or maintain their aforesaid action thereof against her, because she says she doth not, and never hath sold merchandise in the art of a dry-goods shopkeeper according to the custom of feme sole trading in manner and form as the said plaintiffs have above complained against her, the said Hannah, and of this she puts herself upon the country." The plaintiffs demurred to the 1st, 2d and 3d pleas, and on motion of the plaintiffs the 3d plea was stricken out, being a plea of coverture by a female defendant, not signed by her, in abatement, and not sworn to. Issue was joined to the 4th plea.

On the trial it was agreed that the copy of account from the book of original entries be laid before the jury as a correct copy, and that it be further in evidence that the entries were made against Hannah Featherstone alone, and not against Michael Featherstone.

A witness for the plaintiffs testified that he was in the employ of the plaintiffs, and had left about three months previous. He knew the defendant, Hannah Featherstone. She frequently purchased goods of the plaintiffs, and always in her own name. She made no statement in particular. She said she never looked to her husband for assistance in any way. She said she did the business upon her own account. She never objected to bills made out in her own name. She said she never looked to her husband for anything. She had her name on the boarding-house. Witness did not recollect about the store. Never saw her husband in the store in his life. Was very often at her store. Went, generally, to collect bills. She never directed him to her husband. She

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never spoke of her husband. Always spoke of herself, and never mentioned her husband in the business. Witness received money of her; she paid it as her own money. On his cross-examination he stated, he knew she was a married woman. Her husband lived in the city. Did not know that he was a mariner, or that he went to sea. Had seen him coming into the plaintiff's store, but not on his wife's business; his wife's name may have been mentioned. Was aware she was a married woman; but not at first, as he knew. The entries were always made to Mrs Featherstone. She never referred to her husband when she was in the store. Did not know that he ever forbade the dealings of his wife. Being re-examined in chief, he testified to Mrs Featherstone's name in the Directory of 1841.

A. D. Tarr, Esq. testified, on behalf of the plaintiff, that some time before this suit was commenced, he called upon Mrs Featherstone. She said it was out of her power to pay it. She told him her husband had nothing to do with her business; that she would not care if he was out of the world. He called again, and she would not pay it. Her name was on the house. On his cross-examination he stated, he thought the name was on the house, and not on the store. Did not know that she was married, but had seen the person reputed to be her husband. He asked her if her husband would not assist her? Did not know that her husband had been to sea.

The court, on motion, ordered a nonsuit.

Errors assigned :

1. The court erred in directing a nonsuit on the evidence, when the defendant had made the issue, whether the defendant, Hannah, merchandised as a feme sole trader according to the custom of feme sole trading.

2. In nonsuiting the plaintiffs on a point of law, when the only issue on the pleadings was a pure matter of fact, whether an usage for married women to trade as feme sole traders existed in this community; and if so, whether the defendant, Hannah, traded as a feme sole trader within the usage.

3. In nonsuiting the plaintiffs on the ground that the statute defines the only feme sole traders known in this State, and it was necessary to show that the defendant, Hannah, came within the statute.

Barnes, for the plaintiff in error, referred to the Act of 22d Feb. 1718, *Purd.* 471 (1841); 3 *Whart.* 371; *Serg. on Attach.* 7, note 4; *Dwarr Stat.* 637, 639, 641; 2 *Serg. & Rawle* 189.

M'Irvine, contra, was stopped.

PER CURIAM. — There is no feme sole trading by a married woman, with us, but such as is licensed and regulated by the sta-

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tute of 1718. In *Burke v. Winkle*, the action was sustained on the statute alone, the fact that the wife was within it being admitted by the demurrer; and it was ruled that she had power to bind herself by specialty, which she could not have done by the custom of London. In the case before us, the character of the wife, as a feme sole trader, is the very matter put in issue; and on that head the statute is sufficiently explicit. The framers of it had in view the case of a wife left to shift for herself by a husband *gone to sea*; and it is indifferent whether she get her living by shopkeeping or any other employment, or whether he be a mariner or a passenger. It is her being left to contract debts for which his person cannot be reached by process, that gives her the credit, and subjects her to the responsibility of a feme sole. In the case under consideration, the husband was proved, by the plaintiffs themselves, to be resident in the same city with her when the debt was contracted, and, what is as decisive against them, living separate from her. If the husband, *knowing* that his wife carries on a trade, *resides* with her and receives the profits, he gives room for a legal presumption that she conducts the business as his agent, and he is liable for articles furnished in the course of it; as was ruled in *Petty v. Anderson*, (2 Car. & P. 38, S. C. 3 Bingh. 170). And in *Bowyer v. Peake*, (2 Freem. 215), it was held that payment of money borrowed by a wife to carry on a business with the husband's consent, would be decreed against him. But the presumption of his assent will not arise from occasional and stealthy cohabitation. In *Smallpiece v. Dawes*, (7 Car. & P. 40), a bankrupt fruiterer, who had absconded, was not held liable for the price of fruit furnished to his wife, who continued the business, though it was proved that he had attended the marriage of his daughters at church, and had eventually been arrested at the shop: but Mr Baron PARKE remarked, that he would have been liable had the goods been necessaries. Here, it is not pretended that the goods were supplied for consumption; and even if the husband were liable, as for necessaries, the wife could not be joined with him.

Judgment affirmed.

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Koch against Howell.

Book entries of the whole number of pieces of paper delivered by a paper-hanger to his journeymen, made at the time of such delivery, and of the number of pieces actually consumed, the price of each with the price of hanging it and the gross amounts, made when the quantity was ascertained by hanging, though three or four days after the first entry, are evidence.

Where a draft on the vendor was presented in payment for goods to his clerk, who refused it, but by the vendee's direction showed it afterwards to the vendor, the declarations of the latter that he did not know the drawer and would not do the work on it, but that he would see the vendee, are evidence in an action for the goods.

The retention of such order by the vendor until the trial is not conclusive evidence of his acceptance of it.

ERROR to the Common Pleas of *Philadelphia* county, in which an action of assumpsit on a book account was brought by Howell & Brother against Christopher Koch. The plaintiffs offered in evidence their book of original entries, in which a number of items were charged to the defendant to the amount of \$41.95½: the first and last of which were as follows:

12 ps.	Parlour paper	11½ ps.	a 60 cts.	\$6.90
	Hanging 5½ ps. border		50	2.83¾.

The other items were entered in a similar way, but differing in price and quality. Their clerk proved it to be their book of original entries, and that the first entries of business transactions were made in it; that the above entry was made by him on the day it bore date, and that, so far as he knew, it was the general custom of paper-hangers to make their books in the same manner. On his cross-examination he stated it was their practice, when the goods were delivered from their store to the journeymen, to enter the quantity and quality on the first and second columns, and when the work was done, to mark on the third column the quantity actually consumed and carry out the price; thus "12 pieces parlour paper" were entered when the goods were given to the journeymen, and when the work was done, they entered the amount actually used, "11½ pieces, a 60 cts. \$6.90." The date at the head of the entry was that of giving out the goods, and was made by witness just after they were handed to the men. He was not present at the doing of the work nor did he see it done. The pieces not consumed were returned when the work was done, according to the size of the job, sometimes on the same day, sometimes in one, two, three or four days, according to circumstances, and then the second entry was made.

The defendant objected to the admission of the book as a book

[Koch v. Howell.]

of original entries, but the court admitted it to be read and sealed an exception.

The witness further testified, that after the goods were chosen by Koch, he presented an order on the plaintiffs. Witness told him he could not take the order as he did not know the drawer, but that he would show it to Howell when he came in. Koch then said "Well, show it to him and see what he says." Witness afterwards told Howell of the transaction and showed him the order. Howell said he did not know the drawer of the order and would not do the work on it, but that he would go and see Koch.

The defendant objected to the admission of this conversation in evidence, but the court overruled the objection and sealed an exception. The witness further stated that he did not inform Koch of what Howell said, and that he had not returned the order.

The following was the order referred to, and was produced on the trial by the plaintiffs:

Philadelphia, May 13, 1841.

MESSRS. HOWELL & BROTHER,

Please deliver to the bearer, Mr Koch, paper hanging such as he may desire and tell amount of bill by charging to my account.

For paper hangings.

C. W. TIEMAN, JUN.

N. 6th st. above Phoenix st.

The judge charged the jury that it was a question of fact for them to determine, whether the retention of the order by the plaintiffs from the time it was first left with the clerk until their production of it at the trial, was not an acceptance of it.

The defendant excepted to the charge and assigned the following errors:

Errors assigned:

1. The court erred in admitting the book offered as the book of original entries.

2. The entry charging defendant was erroneously permitted to be given in evidence to the jury.

3. The court erred in admitting evidence of the conversations between the witness and the plaintiff, occurring in the absence of defendant, and tending to fix a liability on the latter.

4. In not charging the jury as a matter of law, that the plaintiff's retention of Tieman's order from the time it was left with him until he produced it during the trial, was, under the circumstances, and until explained, a virtual acceptance of that order.

Guillou, for the plaintiff in error, contended that the book was not one of original entries. The items in the first and second columns were merely minutes, which were afterwards to serve as materials for a regular and complete entry; *Patton v. Ryan*, (4 *Rawle* 410); and at the time they were entered the contract was incomplete and the goods had not been delivered to the vendee. *Curren v. Crawford*, (4 *Serg. & Rawle* 3); *Parker v. Donaldson*,

[Koch v. Howell.]

(2 *Watts & Serg.* 19). Being therefore false entries when made, they continued so. *Rhoads v. Gaul*, (4 *Rawle* 407). The proper time to make the entry is when the goods are loaded for delivery to the vendee. *Keim v. Rush*, (5 *Watts & Serg.* 378).

The retention of the order by the plaintiffs without any intimation to the defendant of their non-acceptance of it, taken in connexion with the fact of their afterwards sending the goods, amounted to an acceptance of it. *Story on Bills* 273.

Westcott, contra. The mode in which this book was kept was one usual to the trade, and arose from necessity. It is no objection to the first entry that it was made before delivery of the goods. *Kaughley v. Brewer*, (16 *Serg. & Rawle* 133). The second entry was undoubtedly good, being made after the delivery.

The witness was made the defendant's agent, and the conversation was therefore evidence. 2 *Stark Ev.* 729.

Whether the retention of the order amounted to an acceptance was a question for the jury: but in law it was no acceptance. 2 *Stark Ev.* 207; *Story on Bills* 275; *Chitty on Bills*, 295.

Per Curiam. These entries were made in the usual course of the business, and could not have been made in any other way consistently with it. The pieces were handed to the plaintiffs' journeymen in the first instance, and charged in the first column to the defendant in gross. This seems to have been a memorandum to serve till the proper entries could be made; and as something remained to be done, it might have been insufficient to charge the defendant, had the matter rested there. But cast away that column, and what remains? We have three subsequent columns; the first of them exhibiting the number of pieces, the second the price of each with the price of hanging it, and the third the gross amounts. And these entries were made the moment the paper came to the defendant's use and the quantity was ascertained by hanging it on the walls of his house. No more accurate or systematic method of charging could be devised by one who was at the same time paper-hanger and the vendor of the article.

The declarations of the plaintiff, Howell, in regard to the acceptance of Tieman's order when it was presented to him by the common agent of the plaintiffs and the defendant, were competent evidence. Everything said at the time was part of the transaction; and as the defendant himself had contributed to make it so, he could not object to its going to the jury. Neither was the retention of the order conclusive evidence of acceptance. The fact was susceptible of explanation, and as such it was properly submitted.

Judgment affirmed.

Fox against The Union Academy.

Quære, whether if land be conveyed to trustees in trust for an academy, which is afterwards incorporated by an Act of Assembly directing the property to vest in the corporation, the act is, so far as respects the vesting of the land, unconstitutional and void.

One, however, who contracts with the corporation to pay money for land obtained from them and held by him, not having notice not to pay, and there being no adverse claimant who could again recover the money, cannot raise this question of the invalidity of the transfer in an action of assumpsit by the corporation to recover the money.

It seems it might be otherwise in an ejectment for the land.

The court ought not to answer questions propounded by counsel, which are not necessary to the decision of the cause.

ERROR to the Common Pleas of *Bucks* county.

Assumpsit by the Trustees of the Union Academy of Doylestown, against John Fox, Esqr. The case appears in the opinion of this court.

J. Fox, for plaintiff in error.

Wright, contra.

The opinion of the Court was delivered by

Husrox, J.—On the 5th of September, 1804, John Hough conveyed a certain lot of land to Charles Meredith, to the intent that he should convey the same to the Trustees of the Doylestown Academy, the said John Hough being one of those trustees, for certain uses. On the 6th of September, 1804, Charles Meredith conveyed the same lot to certain persons, who had been duly elected by the contributors towards erecting a building on said lot, viz: Hugh Meredith, Nathaniel Shewell, John Hough, Christian Clemens, Andrew Dunlap, Thomas Stewart, Josiah Y. Shaw, and the survivors and survivor of them, and their successors constitutionally appointed, for the uses mentioned, viz: the chief object thereof to be the education of youth in a grammatical knowledge of the English, French, Latin and Greek languages, &c., and to be used as a place of worship on the Sabbath day, and such other times as would not interfere with the regular business of the academy.

On the 14th of April 1827, an Act of Assembly was passed, reciting the previous conveyances, and that a building had been erected, and that this State had contributed a large sum towards the erection and completion of said building, and the inhabitants and contributors had elected, on the completion of said building, seven persons as trustees of said school, viz: Christian Clemens,

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William Watts, John Hough, Andrew Dunlap, Josiah Y. Shaw, Nathaniel F. Shewell and Dr Charles Meredith, as trustees of said academy, "which said trustees have not yet been incorporated, nor any power given them legally to receive and hold the said property, therefore, &c." It then proceeds to incorporate said trustees (naming them) and their successors, with the usual powers to take and hold all lands, tenements and real and personal, which now is or shall become the property of said Union Academy of Doylestown, by gift, deed or will. It will be observed that the persons named in this Act are the same as those in the deed, except that Charles Meredith is in the place of Hugh, and Wm. Watts in the place of Thomas Stewart, who, as appears in the cause, had resigned. It then confirms the title of John Fox to a lot theretofore conveyed to him by Charles Meredith by direction of the trustees. It provides for a succession of trustees by election of the contributors, and those who shall, at the time of election, be paying for scholar or scholars.

At December Term, 1830, John Fox petitioned for a private road from his house through the Academy lot, in part at least. It appeared that this road was located in the presence of John Fox and the trustees, and to save the expense of another view to assess the damages, it was agreed the viewers who laid out the road should assess the damages, to be paid by John Fox to the Academy, for using part of its land. They assessed the damages at \$42.50, and it was admitted in the court below and here by John Fox, that he signed a paper promising to pay that sum. The paper is lost, and no proof whether it stated to whom that sum was to be paid. He admitted the road had been opened and used by him. The matter lay over some time, and suit was brought by the trustees before a justice, and judgment for them, an appeal, and in the meantime an Act was passed, 16th April 1840, being the 7th and 8th sections of an Act to organize Clarion county. The preamble to the 7th section stated: "whereas in the preamble of the Act, to which this is a supplement, it is stated that the trustees of the said Union Academy, who had been elected by the inhabitants, had no power given them legally to receive and hold the lot on which the said Academy is erected; and whereas the said statement is erroneous, inasmuch as the said lot had been conveyed by indenture dated 6th Sept. 1804, and recorded 29th April 1817, by Charles Meredith, to trustees, for the uses and trusts in the said indenture mentioned; therefore the said Act incorporating the said Union Academy at Doylestown, shall not be construed in any wise to affect the trusts in the said indenture mentioned and contained, but the same shall be and remain as if the said Act had not been passed; and the estate thereby granted shall be and remain invested in the trustees named in the same indenture for the purposes thereof; and all and every part of the said Act incorporating the said Union Academy, which conflicts with the pro-

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visions and trusts of the said indenture, or divests the trustees named therein of any estate or powers, be and the same is hereby repealed."

We have nothing before us, nor was there any thing proved in the court below, to show at whose solicitation the Act of incorporation of 1827 was passed, whether at the instance of the contributors or trustees or both. It was stated and admitted that the proceedings of the Academy and the election of trustees had been under that law from its passage; and as the law required that these trustees should go out each year, the present trustees are different from those named in the charter, except Josiah Shaw, who must have been out for a time and elected in again. It is not worth while to inquire what effect the Act of 1840, last referred to, had or would have had on the rights of the corporation, for it was repealed on the 15th May 1841, and the title to the lot conveyed by Charles Meredith, on the 6th Sept. 1804, is vested in the trustees of the Academy and their successors, under the incorporating Act of 14th April 1827, to have and to hold the same to the uses, trusts and purposes mentioned in said deed of trust. It is quite probable that this would be the construction of law on the Act of incorporation, whether we consider or disregard the two last Acts.

In the course of the cause, Thomas Stewart, one of those to whom Charles Meredith made the deed of trust, and who swore he had resigned before 1827, and John Hough, who had been absent from the county a great portion of the time, but had returned, were, or their depositions were offered in evidence. They each swore he had taken no part in the affairs of the Academy for many years, and not in the passage of these laws. The court decided their testimony was irrelevant. To judge of this, I must go back and state that the case trying was *assumpsit* for the \$42.25, on the plea of *non assumpsit*, and it was stated in the Common Pleas and here, that he owed the money and must pay it; but he wished to try, as I understand it, the question whether an association of men, who are united for a charitable, literary or religious purpose, and who own property, and apply for and obtain an Act of incorporation, which Act vests in them as a corporation what they owned before through the intervention of trustees, is, so far as it vests such property in the corporation, unconstitutional and void; and so entirely so, that a tenant who leases from them, or any person who makes any contract for the use of such property for any period, is exempted from complying with his contract, though he has enjoyed all the benefit of such contract. And this is a very different question from what would arise if these trustees would bring ejectment to try the right to the land. If the defendant below is not compellable to pay in this suit, the Statutes of Limitation bar a recovery by any other person or persons.

If the question, said to be intended for decision in this case, is

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a doubtful one, it ought to be settled, for there is scarcely one literary, and certainly not one religious society, in this State, from the first act of incorporation to this time, whose property is not affected by it. At least, the church or meeting-house was generally at first held in the name of trustees, and I have neither known nor heard of a conveyance by the trustee to the corporation. Generally, but not universally, the act in terms vests the previously held property in the corporation. I think the effect of such act, though perhaps not directly decided in banc, has been before judges at *Nisi Prius*. I made it in *Caufman v. The Congregation*, (6 Binn. 59); but the court said the opposite counsel need not reply to that; but the opinion of the Common Pleas in this case was, that it did not arise in this case; that a person who dealt with and obtained a benefit still continuing from the plaintiffs below, and promised to pay them for it; who had received no notice from any person not to pay; where there is no adverse claimant, and if there was, such adverse claimant to the land could not pretend to any right to recover this money again from the defendant; must comply with his contract. The testimony was irrelevant and the defence not available.

There have been cases where persons not of the association, or not a majority of them, have obtained a charter. I am not speaking of such cases; nor do I give any opinion on the general question to bind myself, and I have no authority to intimate the opinion of the court or any member of it.

The counsel for the Academy took no notice of this point of the unconstitutionality of the law, and I should not have noticed it but from respect to the gentleman who stated it, but did not urge it further than by citing a part of the constitution, and this, as he said, because of the doubt whether the question could be decided in this way.

We have an Act of Assembly requiring the judge who delivers the opinion of the court to reduce it to writing and file it with the reasons thereof; and some members of the bar have complained because an opinion was not given on every point made in the course of the cause; and if the decision of the cause requires that point to be decided, there is cause of complaint. It is far otherwise where the cause does not require a decision on that point; such opinion, so far, would be extra-judicial. Few things have given to the profession more trouble than extra-judicial opinions on points not fully argued. These and *obiter dicta* occasion to the bar and the lower courts more perplexity than can be conceived by those who have not had some experience of their effect. Instead of requiring a court to give an opinion on every point discussed by any counsel on any side, it would be wiser to prohibit any court from giving an opinion on any point not necessary to the decision of the cause.

Judgment affirmed.

Scott against Wells.

Property in a chattel is not changed by a sale and delivery on conditions to be afterwards performed, if they are not performed; but where the delivery is absolute and the bargain is perfect or capable of being made so by reference to something else or an arbiter, the ownership is transferred.

It is certain enough when the price can be obtained by mere computation; therefore a sale of a large raft at so much per 1000 feet and delivery to the buyer changed the property, though it was to be counted and that was not done, there being nothing more to be done by the seller.

A general agent selling a chattel may, with the assent of the vendee, rescind the contract and make a different bargain.

An agent to sell a chattel is a witness for the owner in a suit for its price, unless his negligence or misfeasance be proved and the presumption is against these.

A mere possibility of being sued is a contingent interest that goes only to the credibility of a witness.

ERROR to the District Court for the city and county of *Philadelphia*.

Assumpsit for goods sold and delivered brought by Daniel Wells against Hugh Scott to recover the value of a raft of boards, which the plaintiff alleged he had sold and delivered to the defendant, in which a verdict and judgment were rendered for the plaintiff.

C. C. P. Eldred, a witness for the plaintiff, stated that in May 1833 Samuel Tustin, as the agent of the defendant, bought a raft of boards belonging to the plaintiff at \$12 per 1000 feet, at Richmond on the Delaware, and took it up the Schuylkill at his own expense and risk, employing George Snyder to carry it round, who landed it on the east side of the Schuylkill. The terms of sale were cash. Snyder started on the 8th June and landed it on the 12th. On Monday the 17th the witness and Tustin went to Scott's house, when Tustin told Scott he had bought a raft for him and the price, and he appeared satisfied. Witness then remarked that the raft did not lay very safe, when the defendant said he would send his hands and have it secured with ropes. The defendant proposed to make an estimate of the number of feet, and the 19th was appointed to make it. The defendant sent one Sorber to the raft to make the estimate, who made out 33,500 feet, which was less than the witness thought there was. The witness afterwards met the defendant at Kittinger's in Fourth street, and offered to take pay for 34,000 feet. Tustin was not present. The defendant offered to pay for 33,500 feet, which the witness refused, saying he would rather have it counted, but offered at 33,750 feet, which the defendant refused. They then appointed Friday the 21st to have it counted. Witness attended

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at the time and waited two hours, but no one came on behalf of the defendant. On the 10th or 11th July he saw the defendant, who said the raft was gone, that he had considered it his until they differed about the calculation. Witness put the defendant's name with red chalk on several parts of the raft.

Another witness for the plaintiff testified to the purchase; and Snyder proved that Eldred showed him the raft to be taken round to the Schuylkill for the defendant, which he did and directed it to be secured, and that the defendant's name was on it.

Tustin testified he was employed by the defendant, and agreed for the raft with Eldred at \$12 per 1000 feet, telling him it was going round to the Schuylkill. Witness then engaged Snyder, who took it. On Snyder's return, witness and Eldred called on the defendant and told him, and he was satisfied, and they were to estimate it if they could agree on the amount; if not, to count it; and they agreed to meet for that purpose on the raft the next day but one. Eldred said he did not think it safe where it was; he thought it ought to be attended to. The defendant said he would send ropes down by his hands to secure it. Witness and Eldred went at the time appointed and found Sorber there but not the defendant: they could not find him. Some two or three weeks after, the defendant asked Eldred whether they did not disagree about the estimate. Eldred said "yes." The defendant said that was all he wanted—that cleared him. Witness believed it was the uniform rule the raft was at the purchaser's cost and risk, and was transported at the purchaser's expense. The hands that bring it down are generally discharged at Richmond as soon as it is made fast. He bought this by the 1000 feet. They were generally bought to be supposed at so much, if they agreed. Snyder took the raft round for him.

For the defendant, Sorber testified to Tustin's saying to the defendant he had left the raft at Spruce street wharf, with which the defendant found fault, saying Harding's wharf on the west side of Schuylkill was the place. They then agreed to estimate it and appointed Wednesday. The witness was to estimate for the defendant. He found the raft near Arch street; they met and differed 1000 feet; witness told the defendant there were 33,000 feet; Eldred said 34,000. The defendant offered \$402 to settle; Eldred refused. The defendant said the raft was not at Harding's where he wanted it. Eldred said he would take it there the next day but one and count it out, and the defendant agreed to meet. On Friday there was an unusually heavy freshet in the Schuylkill.

Daniel Thomas proved the conversation at Kittinger's and offer of \$402 or \$404, which Eldred refused, saying he would have the raft measured or counted—he thought it would measure more. Then said the defendant, "Will you fetch it to Harding's wharf and we will have it counted?" Eldred said he would. They agreed to meet on the next day but one to count. The defendant

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appeared to make it a condition it should be delivered at Harding's, because it would be free of expense and he could take it away in his own boats.

Eldred's competency was objected to by the defendant on the ground that he was interested in procuring a recovery in order to relieve himself from an alleged responsibility to the plaintiff as his agent. But the court overruled the objection and sealed a bill of exceptions.

The defendant requested instruction to the jury on the following points:

1. If they shall be of opinion that the amount of lumber in the raft was not ascertained at the time of the freshet; that this was owing to a disagreement as to that amount between the parties; and that the defendant did not by any act of his own prevent such ascertainment; then the property was not changed; it remained the property of Wells and was at his risk.

2. If the sale was made for cash, and the amount of money to be paid was not ascertained, there could be no change of property.

3. If the jury shall be of opinion that the defendant did not claim the property, and that Eldred did not consider himself to have parted with the property before payment, then the property was not changed and the loss must fall upon Wells.

4. If the sale was for cash, and that fact was communicated to the person who made the bargain on behalf of the defendant, then the property was not changed until the price to be paid was ascertained and paid.

5. If the jury shall be of opinion that after the raft was taken to the Schuylkill, Eldred did engage and undertake to transport it to Harding's wharf, and before he did so the freshet swept it away, then the loss must fall upon Wells.

6. If the jury believe the testimony of Thomas as to the facts which occurred at Kittinger's tavern, then those facts as detailed in his deposition amount to proof that no change of property had taken place.

7. It is a rule of law, binding on court and jury, that if an unimpeached witness swears directly to a fact and is not contradicted, that fact must be taken to be proved and cannot be disregarded.

8. That it was competent to Eldred, and within his agency, when he found there was a disagreement as to amount, to reassert ownership over his principal's property; and if the jury shall be of opinion that he did so, either at Kittinger's or by his undertaking to transport the raft to Harding's, then the raft remained at his risk.

The court (JONES, J.) charged as follows:

This is an action for goods sold and delivered. The plaintiff alleges that he sold to the defendant a raft of boards in the spring

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of 1833. Both parties, it is said, acted by agents. The plaintiff employed Eldred as his agent to sell the raft, and the defendant employed Tustin to buy a raft for him. And the plaintiff says that the defendant's agent came to his agent at Richmond and bought from him the raft in question, which, he says, was then and there delivered by Eldred to Tustin, and that Tustin employed Snyder to take it round into the river Schuylkill. The defendant denies that there was any sale and delivery of the raft, and this is the whole question. Whether there was a sale and delivery of the raft, is a question of fact to be decided by the jury upon the evidence. The importance of the question arises chiefly from the fact, that soon after the raft came into the river Schuylkill, it was swept away by a freshet. The question, who is to bear the loss, depends upon the question of property. If Wells owned the raft when it was swept away, he must bear the loss; if Scott owned it, he must bear the loss. But the question of property depends upon the question of sale and delivery of the raft, and that question, as I have said, is a question of fact depending upon the evidence.

But before calling your attention to the evidence, it will not be improper to say a few words about the law touching the bargain and sale of goods. If the owner of goods sells them for cash, he has a right to keep them till the price is paid or tendered to him; if the purchaser wants to get possession of the goods he has bought, he must pay or offer to pay the price of them; and the seller, if he wants to bring an action of debt for the price, must deliver the goods or offer to deliver them; so that each party has the right to compel the other to perform his part of the contract, by first performing or offering to perform his own part of it. But in the case supposed, the effect of the bargain is to change the property from the seller to the buyer; and, if the property is afterwards destroyed, the loss falls upon the buyer and not on the seller. It is another principle that when goods are sold for money, if the purchaser by agreement takes the goods bought into his possession, though no money is paid or earnest given or day fixed for the payment of the price, still it is a good bargain and sale of the goods, and the property in them passes from the seller to the buyer, and the seller may sue the buyer for the money. But if a man sells goods for cash, though he cannot be compelled to deliver them before payment of the price, yet he may deliver them, if he chooses, and then bring an action for the price; or if the buyer of goods, upon a cash sale, procures the delivery of them by fraudulent means, although the seller may, if he chooses, reclaim the goods on the ground of the fraud, yet he may treat it, if he choose to do so, as an ordinary and fair sale and delivery of the goods and sue for the price of them.

There can be no difficulty then in this case, if the evidence proves an actual sale and delivering of the raft by the plaintiff to

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the defendant at Richmond. It is agreed, that if there was a sale at all, it was a sale for cash. The plaintiff was not obliged to deliver the raft till he was paid; but if he chose to do so, the defendant cannot complain that the plaintiff gave up one of his rights. But the defendant denies that there was a sale or delivery of the raft. As he alleges, they were still negotiating the contract, and had not actually concluded it when the raft was carried away by the freshet. Some facts touching this question are not disputed on either side. Tustin (the agent of the defendant) and Eldred (the agent of the plaintiff) had agreed upon the price. The price was \$12 per M feet; but they had not counted the lumber, nor had they agreed upon the quantity at which the raft should be estimated. After the price per M feet had been agreed on, Snyder took the raft from Richmond round into the Schuylkill river, and left it at a place between Arch and Race streets. After the raft had been taken into the Schuylkill, Eldred, the agent of the plaintiff, and the defendant and Tustin had an interview or interviews relative to fixing upon the quantity; but they differed about it and never did agree.

The first question, then, is, whether it was indispensable to the completion of the contract of sale, that the quantity of the lumber should be estimated or counted before the bargain and sale of it was complete? It is argued upon the part of the defendant, that, until this was done, the bargain was not closed, and consequently that the raft was the plaintiff's when it was lost. This is put to the court as a question of law. If the law on this point be as the defendant contends, it rules the case in his favour, as there can be no question about the fact that the quantity was not ascertained, either by an agreed estimation or by counting. But parties have the power to make a bargain and sale of goods so as to pass the property in them by the actual delivery thereof, without first fixing the quantity upon which the price is to be computed. They may agree that the quantity shall be ascertained after they come to the possession of the purchaser. A consideration, it is true, is indispensable to the validity of a contract; yet the parties are at liberty to make the terms of their contract few or many. In this case, the promise of the defendant, through his agent, Tustin, to pay for the lumber at the rate of \$12 per M feet, was the consideration of the contract of sale.

The question is, whether the parties had agreed upon all the terms and done all the things which they intended should enter into the contract and be preliminary to the transfer of the property of the raft: and this is a question of fact. If the meaning of the parties was, that the raft should remain the property of the plaintiff till the lumber was counted or an estimation agreed upon, the contract was executory and the raft continued to be the property of the plaintiff. But if the meaning of the parties was that the property in the raft should vest in the defendant immediately,

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at the rate agreed on, and the quantity be ascertained afterwards, in that case the raft did become the property of Scott immediately. The meaning of the parties must be ascertained from what they said and did; and the most direct evidence you have in this case is the testimony of the two agents. Eldred says that Tustin bought the raft at Richmond for Scott, took it out of his possession and took it up the Schuylkill at their own expense and risk. Tustin says, it was a day or two before he and Eldred agreed on the price. He says, he offered \$12 per M, and "he (Eldred) agreed to take it, and I closed with him at \$12." He also says, afterwards he told Scott he had bought a raft for him, and Scott appeared satisfied. Eldred says, Snyder was employed by Tustin to carry it round to Scott. Tustin says, he engaged Snyder to run it round for Scott. Snyder don't recollect who first called on him.

This is the substance of the evidence relative to the fact of the sale and delivery, and all this took place before the 8th day of June; because on that day Snyder started with his raft. The raft was not landed till the 12th, and Eldred and Tustin did not call on Scott till the 17th June. Does the evidence of Eldred and Tustin prove an actual sale of the raft, or was it a mere negotiation about a sale? Does this evidence also prove the delivery of the raft? In whose employ was Snyder? For whom had Snyder the possession of the raft? If Eldred had agreed to deliver the raft in the Schuylkill, and had employed Snyder to take it round, it would have shown conclusively that the raft was not delivered. But if Tustin employed Snyder to take it round on behalf of Mr Scott, it is evidence to show that Tustin had already taken possession in behalf of Scott. If you should think the raft was delivered, it would be evidence that the bargain for the raft was closed between the parties. The delivery is generally the act which consummates the contract, though the parties may agree upon something to be done after the delivery. But the object of a delivery, ordinarily, is to join the actual possession to the right of property. If the seller, therefore, do not design to part with his right of property, it would be singular that he should part with the possession of it; and if the purchaser does not suppose he has acquired the right of property by the contract, it would be singular that he should take the possession. Without, therefore, saying that the delivery is conclusive evidence that the bargain was closed and understood to be closed, I put it to you as evidence very pertinent and forcible to prove that fact.

The plaintiff also relies upon certain declarations of the defendant to prove the property was sold and delivered to him. Eldred and Tustin both testify that upon Scott's being informed by Eldred where the raft was, and that he did not think it safe, Scott said, he could or would send down and secure the raft with ropes. The plaintiff contends that this was treating the raft as his own; that if it was still in the possession of Eldred as the property of Wells,

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Scott would not have concerned himself about its safety. Scott might have done such a thing as a neighbourly or friendly act; but whether that was his motive, or whether he considered it his property and that he was bound to look after it, is for the jury to consider. Another circumstance relied on, is the declaration of Scott, in a conversation with Eldred, that he (Scott) considered it his raft till they differed about the estimate; and this may account for his saying he would send ropes to secure it. The argument is, that if the property was Scott's, it became such by the sale and delivery, and a disagreement about the quantity afterwards could not annul the sale and delivery, if it was already perfect. What the parties believe about their rights is not always conclusive of what their rights are: they may be mistaken as to their rights, and where all the facts of the case are clear, the law will decide what the rights of the parties are, and sometimes against their own opinions. Still, where it is not quite clear what the facts are, what the parties believed about their respective rights is proper evidence to be considered by a jury upon the question. It is evidence of what they understood the contract to be.

The defendant urges an argument of the same sort against the plaintiff. After the raft had been landed in the Schuylkill, above Arch street, Eldred, at an interview with Scott, promised to take the raft to Harding's wharf. Eldred says, he does not recollect it, but Thomas swears that he did, and that Scott made it a condition precedent. Why did Eldred agree to do this, unless he regarded the contract as incomplete and the property as still his? Why should he incur the trouble and expense of employing hands to take the raft to another place, if he was not bound to deliver it to Scott at that place? This is an argument of the same nature that the plaintiff urges from the circumstance that Scott said he would send men to secure the raft with ropes, and both are very proper to be considered by you. If Snyder was the sub-agent of Scott to take possession of the raft for him at Richmond and take it round into the Schuylkill at the risk and expense of Scott, it was the business of Snyder to take it where Scott wanted it; and, if he did not do so, he could not blame Eldred for that; and any promise of Eldred to take it to another place would be gratuitous. But if Snyder was the sub-agent of Wells, to deliver this raft on the Schuylkill at Harding's wharf, as a place agreed upon for delivery, then it would follow that a delivery at any other place would be no delivery to Scott, and Eldred was bound to take the raft across to Harding's wharf. How the fact was you will say. If the sale and delivery were completed at Richmond and Snyder was the sub-agent of Scott, a gratuitous undertaking by Eldred to take the raft from the place where Snyder left it to Harding's wharf, would not rescind the sale and delivery nor invalidate what had been concluded at Richmond. But the defendant contends, it

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is not clear who did employ Snyder, and he relies upon what Snyder himself says upon the subject. Snyder don't recollect who first spoke to him. But Eldred told him that Tustin had bought a raft for Scott, and took him to show it. Snyder says he has not been paid. This is considered by the defendant as in opposition to the testimony of Eldred and Tustin, who agree that Tustin employed him. You will consider the question.

Again, the defendant contends that no witness says the lumber was delivered in the Delaware. The defendant, if I recollect the testimony, is correct, if he means merely that no witness says, *in words*, that the lumber was delivered in the Delaware. Eldred does not say, expressly, he delivered the raft, but he says Tustin bought it for Scott and took it out of his possession and took it up the Schuylkill. Snyder says that Eldred showed him the raft he had sold to Tustin, that was to be taken round to Scott; and, as I have said, both Eldred and Tustin say that Tustin employed Snyder. These circumstances, the plaintiff contends, prove conclusively a delivery. Whether they do or do not, the jury will decide.

The defendant also contends that Tustin was not the agent of Scott, except to make the contract for the raft; not to take possession of it and send it round to the Schuylkill, or in fact to do anything more than merely make the contract. It is true, that an agent cannot bind his principal beyond the authority given him; but the principal may ratify an unauthorized contract of his agent. What the extent of Tustin's authority was, is a question of fact. If he was the agent to buy a raft and receive it upon delivery, and he did buy this raft in question and receive it on delivery; if he afterwards, without authority, employed Snyder to take the raft round to the Schuylkill, it could not prejudice the plaintiff. The evidence upon the subject of authority is the testimony of Norris and the testimony of Tustin at the time he was employed, and his testimony as to what took place between Scott, Tustin and Eldred at the Falls of Schuylkill on the 17th of June, when Tustin told Scott what he had done, and Scott appeared satisfied, and what Scott said as to securing the raft. You will say, upon the whole evidence, whether Tustin exceeded his authority, and whether, if he did, Scott did not ratify and approve all that had been done; or, if not, whether Tustin was not authorized not only to conclude upon the sale, but also to receive the delivery. Or, at the least, whether Tustin had not authority to conclude the contract so as to make it conclusive and binding upon the parties; not merely to negotiate terms of contract to be submitted to Scott and not to be binding until Scott should assent to them. If the authority was merely to negotiate terms to be submitted to Scott, Scott would not be bound till he assented, and then the question would be, whether he did not ratify and agree to the terms when the parties met on the 17th of June?

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I have now referred to the principal points made in the argument on both sides. It is so purely a question of fact, that further observations seem unnecessary. The action is for the price of goods sold and delivered, and the question is, whether the raft was sold and delivered by the plaintiff to defendant? The most important evidence, as it strikes me, is that which applies to the original transaction between Eldred as agent for plaintiff, and Tustin as agent for defendant. The evidence of Eldred and Tustin applies to this point of time; the other testimony applies to subsequent times. Norris's testimony applies to an earlier time, when Tustin was employed as agent by Scott. Yet the other evidence is important to be considered, as showing what the parties understood the transaction between them to be."

The defendant then requested the court to charge upon his 8th point, as not having been answered in the charge, and the court further charged the jury, as follows:

"What was the extent of the agency of Eldred is a question of fact. His authority as an agent was not in writing, so far as it appears. It is for the jury to say, therefore, whether he had authority in the case supposed. But an agent who has authority merely to make a contract, has not thereby authority to rescind the contract after he has finally made and concluded it. By concluding the contract his agency is closed. As to the undertaking of Eldred to convey the raft to Harding's wharf, I have already answered sufficiently. So as to that which happened at Kittinger's, it is proper to be considered by the jury, but it is not conclusive."

The defendant excepted to the charge, and assigned the following errors:

First. Admitting in evidence the deposition of Eldred.

Second. In the charge of the court:

1. In not answering directly and fully the propositions stated in the first and second points.

2. In not instructing the jury that if the quantity of lumber in the raft, and the amount of money to be paid, remained unascertained (without defendant's fault) at the time of the freshet, the property was not changed.

3. In stating it in effect to be the law, that a delivery necessarily worked a change of property.

4. In treating the undertaking of Eldred to change the position of the raft (assuming it to have been made) as a gratuitous undertaking, without consideration, inconsistent with an agency to sell, as being the same thing with a rescinding of the contract, and thence deducing the conclusion that the raft did not remain at his risk.

5. In not giving the instruction asked in the 6th and in the 8th point.

Third. That the award of arbitrators was made by a tribunal

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of whom but two out of three heard the case throughout, and united in deliberation, although all three heard it in part, and the court refused to set aside the award.

L. A. Scott, for the plaintiff in error.

J. M. Read, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—The material question is, whether the property passed by the sale and delivery in the first instance. The facts were not contested. Eldred, the vendor's agent, sold a raft of boards to Tustin, the purchaser's agent, at a certain rate the thousand feet, and delivered it to a person employed by the latter to take it, at the purchaser's expense and risk, from Richmond on the Delaware to a place on the Schuylkill, where it was afterwards moored. The delivery was unconditional, pursuant to the contract and complete: why then did it not pass the property and put it at the purchaser's risk? Because, say the purchaser's counsel, the number of feet contained, or the sum total of the price, was not settled by the terms of the contract; and the consequence attempted is, that the sale was imperfect in its members. Had there been no delivery, or a conditional one, the purchaser would not perhaps have been bound till the number of feet and entire price had been ascertained; but the parties evinced, by taking the last step, that nothing remained to be done in order to perfect the contract. If I deliver a chattel in execution of an agreement to sell it in terms to be fixed subsequently, the ownership and risk of the property doubtless remain with me in the mean time; but such delivery is conditional, and after an ineffectual effort to perfect the sale, no delivery at all. On the other hand, it is a rule, perhaps without an exception, that whenever there has been an absolute delivery pursuant to a bargain perfect in its members, or capable of being made so by reference to something else than supplemental conditions by the parties or an arbiter appointed by them, the ownership of the property is vested by it. I grant that a sale may be fatally defective in its members; and that, by the civil as well as the common law, the specification of a price is necessary to constitute it. But there is abundant authority to show that it may be supplied by arbitrament, where there is a provision in the contract for it; and why not by calculation where the contract furnishes a basis for it? Surely the price is certain enough when the sum of it can be obtained by computation. For instance, I sell my fat bullocks grazing in a particular field, at so much the head; there are five of them, but the number is not specified in the contract; they are delivered and driven away, but rush over a precipice and break their necks: surely it will not be said that I am to lose the price of them, because the aggregate amount of it or the number was not specified by the terms of the bargain.

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Yet the principle is necessarily the same, whether the number be five or five hundred. But I would be bound to bear the loss, were the number, however inconsiderable, determinable by a process provided in the contract. But where no such process is provided, may not a farmer sell his growing crop by the bushel, so as to change the ownership of it in the mean time, without fixing the quantity by an estimate before it is threshed? To sell by the bushel and fix the quantity would, in effect, be to sell for a round sum. Had, indeed, the agents of the parties before us made it a condition that the number of feet in the raft should be counted or estimated by a particular person, the sale would have been incomplete, and the property at the vendor's risk till that were done, insomuch that he might have passed the title to another, leaving the prior vendee to his action for a breach of the contract; but by the bargain actually made, the vendor sold just so many feet as the raft actually contained. There is no process pointed out to ascertain the number; and why may he not recover in proportion to the number ascertained by the evidence? A sale is imperfect only where it is left open for the addition of terms necessary to complete it, or where it is deficient in some indispensable ingredient which cannot be supplied from an extrinsic source. But when possession is delivered pursuant to a contract which contains no provision for additional terms, the parties evince, in a way not to be mistaken, that they suppose the bargain to be consummated. Even where actual possession has not been taken, the ownership and risk pass by the contract, if nothing remains to be done to the property by the vendor, such as counting, measuring, weighing or filling up, to ascertain the number, quantity or weight. Thus in *Rugg v. Minett*, (11 East 210), turpentine had been sold at so much the hundred weight in casks, to be taken at the marked quantity, except two out of which the others were to be filled up before delivery; and those two were sold as containing indefinite quantities. The buyer employed a person to do the filling, but before he completed it, the warehouse, with its contents, was destroyed by fire; and it was held that the property in those filled up had passed to the buyers, because nothing remained to be done to them by the vendors. Now the number of them, like the number of feet in this raft, could be ascertained only by extrinsic proof; and the case, therefore, is in point. In perfect consistence with it is *Zagury v. Furnell*, (2 Camp. 240), in which a sale of goat skins by the bale, containing a specified number, was held not to pass the property, because the usage of the trade, which was consequently a part of the contract, made it the duty of the seller to count the skins in each bale before they were delivered. So in *Hanson v. Meyer*, (6 East 614), an agreement to sell all the vendor's starch in a particular warehouse, at so much the hundred weight, the number of hundreds to be ascertained before delivery, did not presently pass the ownership. There is no lack of author-

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ity for the principle, that while any thing remains to be done *by the terms of the contract*, to ascertain the entire price, the property remains at the risk of the vendor; and in *Withers v. Lyss*, (4 *Camp.* 237), the sale of an unascertained quantity of rosin in a particular warehouse, not taken away but requested to be kept in the names and at the disposal of the purchasers, was held not to have been completely delivered; but it certainly would have been otherwise had the actual custody of it been changed. In that event the sale would have been perfect, provided the quantity could have been ascertained by proof. In the case before us, the raft was actually delivered; and, in the absence of stipulation to the contrary, the delivery evinced that no more was to be done by the seller. Had he been unable to prove the number of feet which were contained in it, the sale would have been incomplete, and he could not have recovered. As he was able to satisfy the jury on that head, we must take it that the title passed to the vendee. Did the subsequent transactions revest it?

The jury were left to judge of the authority given to the agents as a question of fact; and as there was evidence to found a conclusion that their powers were general, we must treat the case as if the fact were so; and we must say that Eldred was competent, with the assent of the other party, to rescind the sale, revest the title, and make a conditional sale to the same vendee on terms which would leave the property at his principal's risk till the conditions were performed. Was that done?

It certainly was not intended. When he first met Scott, the purchaser, there was no proposal on either side to recede from the bargain or alter its terms. On the contrary, Scott expressly ratified what had been done, and in addition, proposed to fix the number of feet by an estimate, to which Eldred acceded, and a day was appointed to meet at the raft and make it. This new agreement, it will be remarked, was not only an independent but a conditional one, and being itself imperfect, was of no force being unexecuted. At the day appointed, Eldred and Tustin came, and met, not Scott, but a person on his part, who said that Scott would attend; but he came not, and nothing was done. Eldred then sought him, found him, and agreed with him to have the raft taken out of the water and counted at a day named. Eldred again attended and Scott did not, so that the second agreement turned out to be as abortive as the first, and both became as inoperative as if they had not been made. Moreover, it is obvious that neither of them was intended to impair or alter the sale. The object, a distinct and independent one, was to relieve the purchaser from the alternative of taking the agent's word for the number of the feet, or taking the trouble to ascertain it for himself. To hold that this turned the previous absolute sale into a conditional one, out of which the buyer could creep by refusing to co-operate in what was further to be done, and thus leave the property on the vend-

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or's hands at a place remote from the market, would be not only unreasonable but inconsistent with the evident purpose of the parties.

As to the declarations of Scott, on the one hand, that he had once considered himself the owner of the raft, and the consent of Eldred to remove it to Harding's landing, on the other, it is enough to say that these, though indicative of the understanding of the contract by the parties, were not conclusive of the title, and that they were properly left to the jury. What is conclusive of it, however, is that the terms of the sale were unconditional and sufficiently certain to pass the property in the first instance; that there was no evidence of an act done to rescind or alter it, and that when the subsequent negotiations failed, they left the contract where they found it.

It is impossible to imagine an objection to the competency of Eldred as a witness. The suggestion is that he may have incurred liability to his principal for negligence or misfeasance, from which he would be exonerated by a recovery in this action; the answer to which is, that there was no evidence of negligence or misfeasance, and that, in the absence of proof of it, the law presumes against it. Besides, exposure to the possibility of an action is one of those contingent interests which go only to credibility. Such were the principles that ruled a similar point in *M'Creedy v. The Schuylkill Navigation Company*, (3 Whart. 424), and which rule the point before us.

Judgment affirmed.

Reid against Stanley.

In ejectment, one who is neither party nor privy to the action, though an occupier of the ground in dispute for a time previous to the bringing of the ejectment, cannot be affected by the judgment that may be given in it, and is therefore a competent witness for the plaintiff.

Though a recovery for mesne profits cannot be had till possession is recovered, yet a possession gained by the owner's entry is sufficient without the necessity of an ejectment.

If one is applied to as agent to investigate the title of another to a lot which he has an interest in purchasing, and he undertakes the duty, he cannot use the information thus acquired to the injury of his principal. He is bound to disclose to him any material information obtained concerning the title, and if he conceals it and buys himself, it is a fraud; and he cannot hold the property without reimbursing to the principal any loss he may sustain by failing in the purchase.

ERROR to the District Court for the city and county of *Philadelphia*, in which ejectment was brought by Isaac E. Reid against Job Stanley, Charles Elsly and Catharine Barrett, to recover a

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lot of ground on the north side of German street between Third and Fourth streets, marked in a plan of division of Norton Pryor's estate, No. 39. The facts in evidence were as follows:

On a division of the real estate of Norton Pryor, 11 lots, situate on the north side of German street, were allotted to Charles Pryor, who on the 7th June 1784 conveyed to Joseph Few lot No. 38, in breadth 21 feet and in depth 136 feet, bounded by lot No. 39, assigned to Charles Massey and wife. On the 21st Dec. 1787, Few conveyed to John Morrison, who on the 30th June 1791 conveyed to Peter Morrison, calling it lot No. 23. On the 13th March 1806 sheriff Barker sold and conveyed it as the property of Peter Morrison to John B. Dumontet. On the 25th May 1813 Dumontet devised all that lot situate on German street, &c., to William Y. Birch and another, their heirs and assigns in trust to pay the income and proceeds to the separate use of his daughter during life and after her death over.

1. The defendants offered in evidence a deed dated October 8th 1828, from William Y. Birch, trustee to Hugh Buck, for lot on north side of German street between Delaware Third and Fourth streets, &c., marked in the plan of the division of the estate of John Pryor, deceased, No. 23, containing 21 feet by 136, bounded south by German street, east by lot No. 37, assigned to Thomas Pryor, north by Claypoole's ground, and west by lot No. 39, assigned to Charles Massey and wife. Being the premises which, &c., (reciting the sheriff's sale and will), meaning the hereby granted lot, and reserving an annual ground-rent of \$36. The plaintiff objected to this deed on the ground that Birch, under the will, had no power to sell and could not consequently convey a title to Buck; but the court admitted it and sealed a bill of exception.

The plaintiff's title was as follows: A deed, Dec. 31st 1812, from Henry Pratt to Abraham Kintzing for (*inter alia*) a lot marked on the plan of division of the real estate of Norton Pryor deceased, No. 39, situate on the north side of German street between Third and Fourth streets, containing in front 21 feet and in depth 136 feet, bounded north by ground of Claypoole, west by lot No. 40, south by German street, and east by lot No. 38. Being the same lots which by deed of partition dated 12th Feb. 1812, were allotted to Henry Pratt, assignee of Thomas Massey, who was son of Charles Massey and wife, who was daughter of Norton Pryor. Deed, Jan. 25th 1813, Abraham Kintzing to Henry Pratt for same lot. Deed, May 27th 1836, Henry Pratt to Isaac E. Reid, the plaintiff, reserving a ground-rent of \$52.50 per annum.

2. The defendants offered Hugh Buck, who stated on his *voir dire* that he had possession of the lot of ground he bought from Birch, till he sold it back to him, for six or seven years. The

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plaintiff objected to his competency, but the court admitted him and sealed an exception.

He proved that the lots were vacant: no one in possession. He put several houses on the lot he supposed he had taken from Birch, (No. 39). Pratt claimed the other, (No. 38), and he rented it of Pratt on the 14th October 1833, at \$20 a year.

3. The defendants then offered evidence of the value of the improvements and rents. The plaintiff objected, but the court admitted it and exception was taken. Buck then stated that the buildings he put up were worth \$1300 or \$1400. He refused to pay Pratt for the second year's rent till he showed his title. Pratt sued him and recovered. He had no acquaintance with Reid; but was advised by Heron to go to him and he would search the records.

4. The defendants then offered testimony as to a conversation between the witness and the plaintiff, relative to employing the plaintiff to search the records, which was objected to as irrelevant and illegal, but the court admitted it and the plaintiff excepted.

Buck then went on to state that he engaged Reid to search the records, who told him Pratt's title to the vacant lot was good enough and advised him to buy it. Witness declined buying of Pratt. When witness went to pay Pratt his rent, Pratt told him he had sold the lot to Reid and witness was to give possession to Reid. Witness took Reid along to give him possession, but Reid went part of the way, left him and never came to get possession of him. Nothing was said about buying the buildings. Pratt claimed the vacant lot as his. On the 30th May 1836, Pratt gave witness written notice to quit his lot on the 30th June 1836, stating the premises were let to Reid, and directing him to give immediate possession to him. Witness further said, that when he sold back to Birch, he did not know the buildings were on the wrong lot, and that there was a flaw in Birch's deed to him.

5. The defendants offered R. Smethurst to prove conversations between Reid and Pratt respecting the sale of the lot. Objection was made by the plaintiff, but overruled and exception taken. He proved that the plaintiff applied to Pratt for and obtained a vacant lot on German street, and that nothing was said about buildings on it. It was said to be the lot in Buck's possession. Pratt had no other lot on the north side of German street between Third and Fourth streets. He was not familiar with its location.

John Heron then testified that he recollected directing Buck to Reid. The next time he saw Reid, Reid told him he had searched the records for Buck and found Buck's houses were on the wrong lot. That passed over for a few days and Buck was about selling his property to Birch. When Buck was selling or had sold it, Reid asked witness if Buck had received his money for it; he told him he had not but expected he would in a few days. Reid then said he wished Buck had his money, for the buildings were on the

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wrong lot; that if Buck once got his money, he would take the lot on ground-rent and get the houses, and asked witness if he would do it. Witness replied it was rather too dirty a job to have anything to do with, but said if Reid did it, he (witness) ought to have part of the profits. Reid did not consent to this. Witness afterwards saw him but he said nothing more. Reid told him in the conversation he had with him, that he would not have taken the lot, if he had not known there were buildings on it.

6. A sixth bill of exception was taken by the plaintiff to evidence of the amount of rents of the property with the buildings on it.

The defendants requested the court to charge upon the following points:

1. That upon the evidence in this case the jury have a right to presume an exchange to have taken place between Pratt and Dumontet or Birch; and that such exchange, though by parol, if followed by possession and improvements, would be valid.

2. That if there was no exchange, yet if Pratt stood by and saw the buildings put upon the lot 39 without giving notice, he could not recover in ejectment without paying for the improvements.

3. That if there was a mutual mistake of fact as to the position of their respective lots, Pratt could not recover without paying for the improvements.

4. That by his claim of lot No. 38 as his own, suing for rent, claiming damages, &c., Pratt was equitably estopped from claiming No. 39; at least without paying for the improvements, if they were put in *bonâ fide*.

5. That Reid, upon the evidence, is not to be considered as a *bonâ fide* purchaser without notice, but is affected by all the equities with which Pratt was affected; and therefore, if entitled to recover, must pay for the improvements.

6. That if the jury believe that Reid was applied to by Buck to examine into the state of the title for him, and undertook the office, Reid stood in the situation of attorney or confidential agent for Buck; and as such was disabled by the rules of law from becoming the purchaser of the property for himself; and that his purchase was void as against Buck and all claiming under him.

7. That the conduct of Reid, in purchasing for himself the lot 39 from Pratt, without communicating to him the fact of the buildings being upon the lot, was a fraud which vitiated the transaction and prevented his obtaining specific performance in this equitable action.

8. That even if Reid was not the attorney or confidential agent of Buck, yet under the circumstances of the case, his purchase was fraudulent and such as to prevent his recovering in this action.

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The judge charged *inter alia* as follows:

I will now notice defendant's 6th point. The general rule is, that where a person is actually or constructively an agent for other persons, all profits and advantages made by him in the business beyond his ordinary compensation, are to be for the benefit of his employers; *Story on Agen.* 203. In *Galbraith v. Elder*, (8 *Watts* 94), the doctrine was applied to the case of counsel and client, and was said to extend to other species of trust. I state the law to be, that if Reid was applied to as an agent by Buck to investigate the title to lot No. 38, and accepted the office, and assumed the duty of making such investigation for Buck, he cannot legitimately use the information thus obtained to the injury of Buck. If the title to No. 39 was found by him to be complicated with that of No. 38, he could not become a purchaser of either to the prejudice of Buck. The facts are for the decision of the jury. It is to be observed that at the date of Pratt's deed to Reid, Buck had not re-conveyed to Birch. Reid's position in regard to those now claiming to hold under Buck is no better than it was in regard to Buck himself. In substance, therefore, I charge that the defendant's 6th point is true.

Errors assigned:

- I. The court erred in admitting Buck as a witness.
- II. In admitting evidence:
 1. Of the deed from Birch to Buck.
 2. Of the value of the improvements and of the rents.
 3. Of a conversation between the witness and plaintiff relative to the former employing the latter to search the records, &c.
 4. Of conversations between plaintiff and Pratt respecting the sale of the lot by the latter to the former.
 5. Of the rents of the property with the houses on.
- III. In charging in the manner mentioned in the charge.

This case was argued at March term 1843 by *Norris*, for the plaintiff in error, and *R. Patterson* and *T. I. Wharton*, for the defendant in error, and was twice re-argued at this term by *Norris*, for the plaintiff in error, and *T. I. Wharton*, contra.

The opinion of the Court was delivered by

KENNEDY, J. — The first error assigned is an exception to the admission of Hugh Buck as a witness on behalf of the defendants below. It is alleged that he was interested in the event of this suit, and liable to the plaintiff in case of his recovery, for the mesne profits of the property in dispute from the 1st day of June, at least, if not from the 27th day of May preceding, 1836, to the 4th day of the same June, when he parted with the possession of the lot in question to William Y. Birch. This action was commenced on the 12th October 1837, and tried on the 2d January 1842. The

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plaintiff claimed under a deed of conveyance from Henry Pratt, dated 27th May 1836, but never made any demand of the lot from Buck, who held the possession of it at the time as the tenant of Henry Pratt, the plaintiff's grantor, to whom he paid the rent agreed on for it up to the 1st day of June 1836. And indeed it appears, according to the understanding between Pratt and the plaintiff, that Buck was not to give the possession of the lot to the plaintiff until the 30th June 1836. This appeared, on the trial, from a written notice to that effect signed by Henry Pratt and addressed to Hugh Buck, the witness, requiring him to leave and deliver up the possession to Isaac E. Reid, the plaintiff, to whom, as Pratt mentions, he had let the same. Under these circumstances, it would seem to be doubtful whether the plaintiff could at any time have held the witness accountable to him for the rents or mesne profits of the lot in question; and more especially as it was not the lot to which Pratt thought, at the time, he had a title, and believed he was conveying to the plaintiff. The lot to which Pratt thought he had a right, was No. 38, which he, as well as Buck, had mistaken the location of lot No. 39. They had transposed the location of the two lots, Nos. 38 and 39, so that the lot actually numbered 39, the one now in question, was in reality Pratt's lot, but was considered and believed to be the lot that was numbered 38, which had been devised by John B. Dumontet to William Y. Birch, who sold and conveyed the same to the witness, Hugh Buck, who, under the mistake mentioned, very innocently put buildings and improvements on lot No. 39, instead of lot No. 38, to the value of \$1400. Reid, the plaintiff, however, who was employed by Buck to examine into Buck's title to the lot which he was improving as his own, discovered the mistake, but concealed it from Buck until he (Reid) became the purchaser himself of lot No. 39, from Pratt, and until Buck had sold and conveyed the lot back, as he supposed, with the improvements made on it by him, to William Y. Birch. The plaintiff, knowing that Buck, through mistake, had made all his improvements upon lot No. 39, instead of lot No. 38, bought No. 39 of Pratt, the latter believing, at the time, that it was without any building or improvement upon it other than a fence of some sort which had been put around No. 38 by Buck, supposing it to be No. 39. The plaintiff, having thus purchased the lot No. 39 of Pratt, with valuable improvements made upon it by Buck, as an unimproved lot, and for a consideration which was deemed equal only to its value in that state, might well feel somewhat diffident about calling on Buck to demand the possession of it from him. And, indeed, it seems, he never did. Buck, however, in the course of a few days after the plaintiff purchased of Pratt, sold and delivered the possession of the lot to William Y. Birch, against whose assignees or their tenants this action is brought. But as to lot No. 38, which Buck, as also Pratt, supposed was Pratt's lot, Buck never did anything with it after the

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plaintiff purchased of Pratt. It does not appear that he used or occupied it in any way. And it is abundantly clear that his occupation of lot No. 39, which is the lot claimed by the plaintiff, was under a mistake, into which Mr Pratt, the owner thereof, as well as himself, fell, and that he would have been greatly the loser had he not sold back to William Y. Birch. And it is equally clear, that if the plaintiff were to recover the lot in question, with all the improvements put on it by Buck, he would gain what he never paid for, and what the owner of the lot never intended to sell, or supposed that he was selling when he sold to him. Under such circumstances, the claim of the plaintiff for mesne profits, against Buck, in any event of the suit, would not seem to have much, if any equity in it. But, in point of law, how can Buck be considered so interested in the result of this suit as to render him an incompetent witness for the defendant, on the score of interest? It appears to me, that he can neither gain nor lose by the direct legal operation and effect of the judgment in this case, nor that the record can be legal evidence for or against him in any other action; and this would seem to be the general rule laid down for testing the competency or incompetency of a witness on the ground of interest. *Bull. N. P.* 284; *Bent v. Baker*, (3 *T. R.* 27); per TINDAL, C. J. in *Doe v. Tyler*, (6 *Bing.* 394); *Rex v. Boston*, (4 *East* 581), per Lord ELLENBOROUGH; *Greenl. Ev.*, pl. 390. A recovery in ejectment, in general, like judgments in other cases, only binds parties and privies. *Chirac v. Reinicker*, (11 *Wheat.* 280). Hence the judgment is not evidence against a previous occupier. *Bull. N. P.* 87. Therefore Buck, being neither party nor privy to this action, though a previous occupier of the lot in question, could not be affected by the judgment that might be given in it. Even in an action brought against a landlord for mesne profits after a judgment by default against the casual ejector, such judgment cannot be given in evidence against him without proof that he received due notice of the service of the ejectment upon the tenant in possession. *Hunter v. Britts*, (3 *Camp.* 455).

It has, however, been objected, that a recovery in this action was essentially necessary, in order to enable the plaintiff to maintain an action against Buck, the witness, for mesne profits; that such action could not be maintained by the plaintiff until he gained possession of the lot, and that such possession as would enable him to maintain the action, could only be acquired by means of a recovery thereof in ejectment. It may be conceded that such action cannot be maintained by the plaintiff against Buck until he shall have gotten possession of the lot; but then it is a mistake to say that it must necessarily be acquired by means of a recovery in ejectment; for if the plaintiff can show that he has the freehold, and is entitled to the possession, he may enter upon the lot without legal process of any description whatever; and having thus acquired possession, may maintain the action in the same manner

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and to the same extent that he could have done had he been put into the possession by reason of a recovery in ejectment. Judge BLACKSTONE says: "before entry and actual possession one cannot maintain an action of trespass, though he hath the freehold in law. And therefore an heir, before entry, cannot have this action against an abator; though a disseisee might have it against the disseisor for the injury done by the disseisin itself, at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin, until he hath gained possession by re-entry, and then he may well maintain it for the *intermediate damage* done; for after his *re-entry*, the law, by a kind of *jus post-liminii*, supposes the freehold to have all along continued in him." 3 Bl. Com. 210; 11 Co. 5; 4 Kent's Com. 119; Co. Litt. 257 a, 275 b; 1 Co. 98; 1 Leo. 302; Tobey v. Webster, (3 Johns. 468); 13 East 489; Willes 329; 2 Stran. 1086; Note (e) Thomas's Coke 58 (72). If the authorities just cited are not sufficient to show that the plaintiff in this action after making such entry and upon showing his right to the freehold and possession in the lot, could maintain his action against Buck for the mesne profits during the few days that he may have occupied the lot after the plaintiff acquired his right, I apprehend, that a recovery in ejectment would not enable him to do so. We, therefore, think that Buck was a competent witness for the defendants under any view that can be taken of the question.

In regard to the exceptions taken to the admission of evidence, it is difficult, if not impossible, to conceive even any plausible grounds for taking them. All the evidence admitted by the court in opposition to the objections of the plaintiff's counsel tended to prove and establish the facts upon which the defendants relied for their defence against the plaintiff's claim. First, for instance, to show that those under whom the defendants claimed had originally a good title to lot No. 38; secondly, to show that a mutual mistake had arisen between them and the former owner of the lot No. 39, by which the position or location of these lots became transposed in the opinions of their respective owners; thirdly, that valuable improvements had been made by the owner of lot No. 38, under this mistake, upon lot No. 39; and fourthly, that the plaintiff, as the agent of the then owner of lot No. 38, who under the mistake mentioned had made the improvements on lot No. 39, had practised a fraud upon him whereby he was prevented from reimbursing himself the cost of the improvements made on lot No. 38 by buying No. 39 from its then owner, Henry Pratt, on the same terms that the plaintiff did. We are therefore decidedly of the opinion that the evidence objected to was all properly admitted.

The only remaining error is an exception to the answer given by the court to the sixth point submitted by the defendants' counsel. By this point the court was requested to charge the jury that "if they believed from the evidence that the plaintiff, Reid, was

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applied to by Buck to examine into the state of the title for him, and undertook the office, he (Reid) stood in the situation of attorney or confidential agent for Buck; and as such was disabled by the rules of law from becoming the purchaser of the property for himself; and that his purchase was void as against Buck and all claiming under him." To which the court answered: "If Reid was applied to as an agent by Buck to investigate the title to lot No. 38, and accepted the office and assumed the duty of making such investigation for Buck, he could not legitimately use the information acquired in so doing, to the injury of Buck. If the title to No. 39 was found by him to be complicated with that of No. 38, he could not become a purchaser of either to the prejudice of Buck." In this answer of the court we can perceive no error. If the mistake in regard to the location of the lots Nos. 38 and 39 was discovered by Reid in the discharge of his duty to Buck as his agent, it was clearly his duty to have advised Buck immediately of it, as it was a matter of the first importance to the interest of the latter that he should be so advised. It might have enabled him to have had the mistake corrected with Mr Pratt in such a way that he could not have been the loser by it, or he might have purchased of Mr Pratt on the like terms that the plaintiff did, and thus have saved himself from loss. But the plaintiff, instead of informing Buck of the mistake, concealed it from him, and, as it would appear from the finding of the jury, without delay became the purchaser of lot No. 39 himself, as an unimproved lot, for an unimproved price; and now wishes to obtain it, with all the improvements put upon it by Buck, from those to whom Buck sold for a valuable consideration. No one can doubt that it would be a fraud of the grossest kind to permit him to do so, without reimbursing them the money or price paid for the improvements. This, however, he has never offered to do. Neither do we wish to be understood as giving an opinion that he would be entitled to recover the lot by doing so, unless the defendants, upon being informed by him of the amount of the monies paid by him for and on account of it, should refuse to reimburse him. This they are bound in equity to do, if they wish to hold the lot under his purchase of it. If he had brought this action after making known the amount paid by him on account of the lot, and payment thereof had been refused by the defendants, he doubtless would have been entitled to recover in it; or if on the trial he had made known the amount and given satisfactory evidence of its having been paid by him, I do not see but the jury might have given a verdict in his favour, to be released upon the defendants' paying the same with the costs of suit within a reasonable time to be mentioned by them in their verdict; or if the defendants had thereupon offered to pay the amount without time, that the plaintiff would have been bound to have taken it without costs, as he had never made it known before or offered

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to accept of it. But in regard to this matter of costs, it is unnecessary to give any definite opinion of the court, as no question of the kind was raised on the trial of the cause.

Judgment affirmed.

Ridge Turnpike Company *against* Stoeever.

To determine whether a toll-house, erected by a turnpike company under their charter within the limits of the road, be authorized, the only question is whether it was built and has been and is still used for that purpose; if that be the case, they are not responsible to the owner of the adjacent soil.

It is otherwise, if they put it up or have used it for any purpose not connected with the road or the collection of tolls.

Quære whether the action by the adjacent owner should be in trespass or case.

An action of trespass would lie, *Per Kennedy, J.*

ERROR to the District Court for the city and county of *Philadelphia*, in which a verdict and judgment were rendered for the plaintiff. It was the same case which is reported in 2 *Watts & Serg.* 548, and the evidence on this second trial was not materially different from that given on the first. The court charged the jury among other things, that the question was, whether the defendants occupied more of the margin of the road extending along the front of the plaintiff, within the lines of the road, than was necessary to the reasonable and convenient enjoyment of the premises; and this was the principal question in the case. They also charged that an action of trespass was maintainable.

Various errors in these and other points were assigned to the charge. The case was argued by

Gerhard, for the plaintiffs in error; and
C. Ingersoll and *Earle*, contra.

The opinion of the Court was delivered by

KENNEDY, J.—Whether the plaintiff below, even admitting him to have been injured in his right to the *locus in quo*, and damaged by the acts of the defendants there, can maintain and recover compensation for his loss in the present form of action, which is trespass, is a question which claimed the particular attention of the counsel of the plaintiffs in error on the argument of the cause, and to which they seemed to look with some degree of confidence for a negative answer from this court. But from the view taken by this court of the case as presented by the record and the evidence therein contained, it is unnecessary to decide this question;

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though I am inclined to think, and only speak for myself, that whenever a proper case for the recovery of damages by the owner of land, upon which a turnpike company have entered and constructed a road for public use under the authority of the law, shall be made out by the owner of the soil by his showing that the company have entered upon and used it for a purpose not authorized by law, and different from any thing that is either expressly or impliedly sanctioned by their Act of incorporation, the form of action to obtain redress may be trespass as here. It seems to me that such form of action may be maintained upon the general principle, which I take to be well settled, that wherever the law has given a person or company a right to enter upon the land of another for a special purpose, and such person or company enters for a different purpose not authorized by law, he or they will be regarded as trespassers, and may be sued as such by the owner of the land. But in the case before us, it appears from the evidence that the defendants below, who are the plaintiffs in error, long after they had entered upon the *locus in quo* and there constructed the road under their act of incorporation authorizing them to do so, entered thereon for the purpose of erecting a toll-house for the accommodation and residence of whomsoever they should appoint to receive and collect their tolls: and this by law, according to the decision of this court, they had a right also to do. *Vide 2 Watts & Serg. 548.*

But it has been argued for the defendant in error, who was the plaintiff below, that the plaintiffs here have taken and occupy more ground than is reasonable for a toll-house and the accommodation of a toll-gatherer and his family. And the court below conceiving that this was all that the plaintiffs in error could claim to use for such purpose, left it as a question of fact to the jury to be decided by them, whether the plaintiffs in error had not occupied an unreasonable quantity of the defendant in error's land, though within the limits of the road, for their toll-house and its incidental purposes; with the instruction that if they had, then this action might be maintained and the plaintiff below was entitled to recover. In this, however, we think that the court erred: for the right of the company to build a toll-house within the limits of the ground appropriated and set apart for the road, does not depend upon any prescribed or fixed size or dimensions of the house, provided it does not interfere with the right of way which the public have to pass and repass. If it should happen to interfere with or unnecessarily obstruct this right, the company may perhaps be indicted for having erected a public nuisance, unless some other remedy be prescribed by their Act of incorporation, or some other Act of the legislature. It is not only proper, but expedient, that the size and dimensions of the toll-houses put up on the road for the accommodation of toll-gatherers and their respective families should be left to the honest discretion and judgment of the com-

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pany, because they undoubtedly have a better opportunity afforded them of determining what may be requisite and convenient in this respect, than those generally who have had no concern with the management of the road. And hence as long as such houses are erected by them with no other view and for no other purpose than the accommodation and convenience of toll-gatherers and their families, so as at all times and seasons to facilitate the speedy collection of the tolls, and prevent all possible delay that otherwise might happen on account thereof to travellers or passengers on the road, they must be regarded as acting within the scope of the authority conferred on them by law. In order, therefore, to determine whether a house erected by a turnpike company within the limits of the road be authorized, and the occupation of it be still lawful, it is only necessary to ascertain whether it was built for a toll-house and has been and is still used by the company for that purpose; and if this shall appear to be the case, all further inquiry in general would seem to be unnecessary. If, however, it can be shown that the company, after putting up the house, have used it for any purposes not connected with the road or the collection of the tolls, they may thereby have rendered themselves liable to the owner of the soil for such unlawful occupation of it. Or if, after having erected and used a toll-house as such within the limits of the road for some time, they cease to use it for that purpose, and use it for a different purpose, as, for instance, by letting it to others for a dwelling-house, they may doubtless be made liable to the owner of the soil for this latter use, which was not warranted by law. *Vide Fisher v. Coyle*, (3 *Watts* 407, 8), where this point would seem to have been decided by this court, but nothing more. What is there said in regard to the company's not having a right to build a house for the accommodation of their gate-keepers and toll-gatherers on the ground of the road, was not the point before the court, and is corrected in 2 *Watts & Serg.* 548.

But in this case it is abundantly clear that the plaintiffs in error at no time used the house in question, and the improvements connected with it, for any other purpose than for a toll-house and for the accommodation of their toll-gatherer and his family. Indeed, there does not appear to be the slightest pretence for insinuating that the company ever designed or intended to use it for any other purpose. Under this view of the case it is plain that the plaintiff below has no cause of action. And that such a view is correct, might be further illustrated by showing that the direction given by the court below to the jury could lead to or produce no practical and determinate result, especially where the finding of the jury shall be, as was the case here, for the plaintiff. From the finding of the jury it is impossible for the defendants to know wherein and to what extent their toll-house and the improvements connected with it have exceeded, in the estimation of the jury,

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the reasonable limits which the court advised them it was their duty to confine the defendants below to. What may be reasonable limits in such case is certainly not a matter capable of being ascertained by any fixed standard. It is obvious that it must depend upon the various views which different men and different juries may, from their experience or want of experience, take of it; hence various and different opinions will be formed and entertained on the subject. So that if the defendants were, even after consulting every juror who tried the cause, to reduce the limits of their toll-house and its appurtenances within the compass considered reasonable by the jury who tried the cause, they may, notwithstanding, be sued again by the plaintiff, and mulcted a second time in damages by a new jury, who may think that more ground is still occupied by the defendants than is reasonable for their toll-house and its appurtenances. But this second verdict against them will afford them no further light as to what they shall do in order to protect themselves against a third suit and recovery, than the first verdict does against the second. A principle, therefore, attended with so much uncertainty as well as inconvenience in practice, could never have been intended by the legislature, and ought not to be adopted or sanctioned by this court.

Judgment reversed.

Maule against Pleiss.

A firm being large dealers in watches and jewelry, and having at all times a large stock on hand, accepted an order to pay \$100 in watches, or a watch, as may suit a purchaser. *Held* that the necessary presumption was that it was the understanding of the parties that they would satisfy the order out of their stock of watches on hand when the order should be presented, and that the holder had no right to insist on a description of watches which the firm happened not to have at the time, and could only procure by sending elsewhere.

ERROR to the District Court for the city and county of *Philadelphia*.

Assumpsit by John M. Pleiss against Caleb Maule, in which a verdict and judgment were rendered for the plaintiff. It was brought on two drafts, one for \$100, the other for \$50, on which there were special counts and the common counts for goods sold and delivered. The defendant, Maule, had the following draft in his hands :

\$453.03

Philadelphia, Dec. 15th, 1834.

On demand please pay to the order of Caleb Maule, four hundred and fifty-three dollars and three cents, one-

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half in watches and one-half in jewelry, and charge the same to Wm. Pusey. J. MORTON.

To Messrs. THIBAUT & BROTHERS.

The following endorsements were on it when the acceptances hereafter mentioned were given. The two last were then made by Thibault & Brothers:

Paid on account of the within	\$200 00
Paid do. do.	40 75
Paid in order accepted	100 00
Paid in do.	50 00

The balance of this order to be paid in jewelry, such as we have in the store belonging to

THIBAUT & BROTHERS.

The defendant gave the plaintiff the two following orders, on which this suit was brought:

THIBAUT & BROTHERS:

On demand please pay John M. Pleiss, or order, fifty dollars, in such jewelry as may suit the purchaser, and charge the same to account of due bill dated 15th Dec. 1834.

April 18th, 1836.

C. MAULE.

Accepted, THIBAUT & BROTHERS.

THIBAUT & BROTHERS:

On demand please pay John M. Pleiss, or bearer, one hundred dollars in watches, or a watch, as may suit a purchaser, and charge the same to account of me as per due bill dated Dec. 15th 1834.

April 18th, 1836.

C. MAULE.

Accepted, THIBAUT & BROTHERS.

The plaintiff called John Sizer, who stated that he had the order for \$100 in his possession, which he got from the plaintiff, Pleiss. He wanted a watch, and presented the order to Thibault & Brothers. Thibault had no gold watch to suit him, but said he expected his son to arrive soon from Washington with some watches, and promised to get him such a watch as he wanted. The witness called again, and wanted a patent lever gold watch. Thibault told him they had none and could not get one. Witness called a third time. When his son arrived, Thibault told the witness his son had sold all the lever watches. He thought he afterwards saw Thibault, who promised to get him one, but did not do so. The witness got tired and returned the order to Pleiss. It was four or five days after getting the order that he called on Thibault. The \$100 order was got purposely for him by Pleiss from Maule. Thibault never made objections to the order. The witness never saw the other order. On his cross-examination he stated he had

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the order in his possession a few weeks. It was accepted by Thibault & Brothers when he received it from Pleiss. He went immediately to Messrs. Thibault after receiving it. He saw no watches there. He looked at some china, but selected none to be paid for by the order.

The plaintiff then offered in evidence the following note, addressed by the defendant to the plaintiff, dated Sept. 19 1836 :

"I have *saw* Thibault & Brothers, as you requested me. They say that if you will wait 15 days, they will furnish a watch that will suit, or they will immediately give you an order on a wholesale liquor store for \$100. For further information apply to them, or I shall be at the court-house to-morrow morning about $\frac{1}{2}$ past 10 o'clock."

The defendant objected to this evidence, but the objection was overruled and an exception sealed.

The defendant then called F. Thibault, who testified that Pleiss first presented the \$100 order to Thibault and Brothers. He wanted a particular kind of watch which they had not in the store. This was two or three days after the date of the order. He showed Pleiss all the watches they had and urged him to take something for it, which he declined. They had \$5000 or \$10,000 worth of gold and silver watches on hand at the time. Pleiss selected none. Some time afterwards Sizer called with the order and wanted a particular kind of watch which they had not. After calling several times, he chose a set of French china, which was laid by for him. It remained two weeks without his calling for it. Witness then sold it. He recollected telling Sizer he might find something to suit when his son arrived from Washington. Sizer found no watch to suit after the son's return. Pleiss often called afterwards, and witness offered to give him an order on a liquor store. He thought Pleiss presented the \$100 order to him for acceptance. He presented the original order or due-bill to him to have the amount of this order endorsed thereon. They continued in business a year after Pleiss called.

On his cross-examination he stated that Sizer called three or four months after the order was accepted and asked for a patent lever watch. He could not recollect whether he showed him such a watch. He called several times in two or three months. As near as witness recollected, he asked for a lever watch every time. He could not recollect whether they had any lever watches. Sometimes they had three lever to one French watch; but he could not say how their assortment was at that time. He told Sizer if they got any to suit him he should have it. He never bound himself to go and buy him a particular watch. He did not recollect whether he showed him the watches his son brought from Washington. He or his son was always in the store. The order was accepted by him at their store. He asked Pleiss to take jewelry for the \$50 order, which he refused.

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The plaintiff then recalled Sizer, who stated that he asked for a gold patent lever watch but was never shown such.

The court charged the jury as follows:

“As to the \$100 order, if Thibault & Brothers, when called upon, refused or omitted to deliver a watch or watches as mentioned in the order, and Maule was informed within a reasonable time of such neglect or omission, the plaintiff may recover the amount with interest under the declaration filed. As no original consideration is shown, the plaintiff must recover on this ground or he cannot recover at all. I have been requested by the defendant to charge that Thibault & Brothers, having offered to the plaintiff a large number of watches to select from, were not bound to do more, and the plaintiff ought to have taken payment in one of the number of watches offered.

I decline ruling the whole case in favour of the defendant on this point as mere matter of law, as it involves considerations of fact; but I submit to the jury to decide whether the current and ordinary stock of watches of Thibault & Brothers was or was not in the view of the parties; and referring to the whole evidence, and particularly to the general knowledge which the parties had of the situation and extent of that stock, whether Thibault & Brothers were or were not ready and willing to deliver on demand such a watch or watches as the parties contemplated by the order. If they were, and the plaintiff refused such a watch or watches, he cannot recover on this order.

As to the \$50 order, the plaintiff cannot recover, as he has failed to prove either a demand or an original consideration.”

The defendant excepted:

1. To so much of the charge as related to the sufficiency of the declaration.

2. To so much as contained the refusal of the judge to rule the case in favour of the defendant on the point submitted by him.

Errors assigned:

1. The court erred in admitting as evidence to affect the defendant, the paper dated Sept. 19 1836, signed C. M.

2. In charging that “as to the \$100 order, if Thibault & Brothers, when called upon, refused or omitted to deliver a watch or watches as mentioned in the order, and Maule was informed within a reasonable time of such neglect or omission, the plaintiff may recover the amount with interest under the declaration filed. As no original consideration is shown, the plaintiff must recover on this ground or he cannot recover at all.”

3. In declining to charge—that Thibault & Brothers, having offered to the plaintiff a large number of watches to select from, were not bound to do more; and that the plaintiff ought to have taken payment in one of the number of watches offered him.

Hopkins, for the plaintiff in error, referred to 1 *Steph. N.P.* 763.

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I. Norris, contra, cited 2 *Miles* 187; 10 *Watts* 110; 7 *Ib.* 382; 7 *Wend.* 311.

The opinion of the Court was delivered by

KENNEDY, J.—Were there no other matter assigned for error in this case than the admission of the evidence mentioned in the bill of exception, I do not know that we would reverse the judgment on account of it; because it is not easy to imagine that the jury could have been misled by it so far as to believe that the liability of the defendant to pay the plaintiff's claim was either sustained or strengthened by it. It, at most, only evinced an anxiety on the part of the defendant to have the plaintiff satisfied, through Thibault & Brothers, with such articles as he seemed to wish. But we think the court erred in their instruction to the jury as to the construction which ought and must be given to the order drawn by the defendant in favour of the plaintiff for \$100 worth of watches on Thibault & Brothers. The drawing of this order and the refusal of Thibault & Brothers to satisfy it in such watches or watch as the plaintiff or the person to whom he passed it, after it had been accepted by Thibault & Brothers, chose to demand, formed the grounds upon which the plaintiff sought to recover from the defendant. The court, instead of putting a construction on the order and directing the jury in respect to it, referred it to the jury to put such construction on it as they should think comported best with the intention of the parties under the circumstances given in evidence. Thibault & Brothers were, at the time the order was drawn, large dealers in watches and jewelry, and having at all times a large stock of such goods and wares on hand, the reasonable if not necessary presumption is, that the understanding of the parties at the time the order was drawn, was that Thibault & Brothers should satisfy it by giving to the plaintiff, out of their stock of watches on hand when the order should be presented to them, the amount thereof, and if they offered to do this, the plaintiff should be bound to accept thereof. This Thibault & Brothers, as it appears from the evidence, were willing and offered at all times to do, but the plaintiff or the person to whom he gave the order, declined to accept of and insisted upon having the order paid in a description of watches which Thibault & Brothers happened not to have at the time and could only procure by going or sending elsewhere and buying them, for the special purpose of satisfying not the order but the demand of the plaintiff or the holder of it. This, as it appears to us, the plaintiff or holder of the order had no right to expect, much less to demand; for it would be contrary to the ordinary and general practice and course of doing such business and therefore unreasonable.

Judgment reversed, and a *venire de novo* awarded.

Drexel *against* Man.

The Supreme Court has no power to issue a mandamus to the District Court for the city and county of Philadelphia to compel them to sign a bill of exceptions.

It seems, the District Court may by rule of court require a party taking a bill of exceptions to specify on the trial the matters of law contained in the charge to which he excepts, and that no general exception to the charge will be allowed but only those distinctly stated.

UPON the petition and affidavit of the plaintiff in error, this court granted a rule upon Judge STROUD, of the District Court for the city and county of Philadelphia, to show cause why a *mandamus* should not issue to him, commanding him to sign the bill of exceptions tendered to him by the counsel for the plaintiff in error, containing a general exception to the whole of the charge of said Judge, and the charge itself *in extenso*. On the return of the rule, the learned Judge put in the following answer :

This respondent, by protestation, not owning or allowing any of the matters of the petition to be true, as they are therein alleged, but waiving, so far as it is in his power so to do, all and every objection to the jurisdiction of your Honours in respect to the prayer of the petition, shows and offers to the consideration of your Honours,

That the District Court for the city and county of Philadelphia is a court of special jurisdiction, constituted by an Act of the General Assembly of this Commonwealth, passed the 28th March 1835, entitled, "An Act to establish the District Court for the city and county of Philadelphia," whose powers, authorities and proceedings are to be ascertained and regulated by the true intent and meaning of the said Act of Assembly and the several supplements thereto, and by such other general laws only as are necessarily to be implied as binding upon the Judges thereof in common with the suitors and parties and their attorneys, in proceedings lawfully instituted in said court.

That the statute of Westminster 2, chap. 31, is the only authority whereby a bill of exceptions is matter of right to be required by any person impleaded before the Judges of the said District Court, and that by the true intent and meaning of said statute, the pretended bill of exceptions, mentioned in the petition, ought not to have been allowed by the respondent, but on the contrary, it was and is his duty to refuse to seal the same.

That the statute of Westminster 2, before, and at the time of the settlement of this country by colonists under the charter

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granted to William Penn, had received a judicial construction, that a bill of exceptions should be taken and allowed only upon some point of law either in admitting or denying evidence, or a challenge, or some matter of law arising upon facts not denied or sufficiently proved, in which either party had been overruled by the court. This proposition was asserted in the argument of *Bridge-man v. Holt*, (*Show. Parl. Cas.* 120), A. D. 1693, as familiar learning in that day, and Sir William BLACKSTONE, (3 *Com.* 372), and Sir Francis BULLER, (*Nisi Prius* 310), severally make the same statement on this subject.

The Supreme Court of the United States, in *Ex parte Crane*, (5 *Peters* 190), a case presenting no other matter for adjudication, denied the right of a party to a general exception to the charge of the Judge presiding at the trial, and required a distinct specification of the point or points of law, in the ruling of which the Judge was supposed to have erred. And to impart to this judgment the highest efficacy, the same court shortly afterwards adopted the following rule of court: "That hereafter the Judges of the Circuit and District Courts do not allow any bill of exceptions which shall contain the charge of the court at large to the jury in trials at common law upon any general exception to the whole of such charge; but that the party excepting be required to state distinctly the several matters of law in such charge to which he excepts, and that such matters of law, and those only, be inserted in the bill of exceptions and allowed by the court."

Our sister States have given the highest sanction to the utility and necessity of this doctrine. In at least sixteen of these, express legislation exists, requiring in clear and positive terms, that in bills of exceptions, a specification shall be made of the points of law, in the decision of which the inferior tribunals are alleged to have erred;—thus, at once, embodying the substance of the British statute, and adopting the exposition which the courts of that kingdom had placed upon it. In the remaining States, it is confidently believed that no decision can be adduced, contravening in the slightest degree the received construction of the statute of Westminster, or any intimation of a practice at variance with its requirements. In Connecticut the statute appears to be yet in force, and the same judicial construction has been given to it which it had received before the colonization of the State. *Wadsworth v. Sanford*, (*Kirby* 456, A. D. 1788); *Watson v. Watson*, (10 *Connec.* 75); *Picket v. Allen*, (*Ibid.* 146). In the Supreme Court and in the High Court of Errors and Appeals of New York, the same doctrine is maintained, as may be seen in the opinions of Chancellor KENT in *Van Gorden v. Jackson*, (5 *Johns.* 467), and in *Frier v. Jackson*, (8 *Johns.* 387), and of Mr Justice WOODWORTH in *Jackson v. Cadwell*, (1 *Cowen* 639), and of Chancellor WALWORTH in *Law v. Merrills*, (6 *Wend.* 274). To the same effect is the decision of the Supreme Court of New Jersey in *Coxe v. Field*, (1 *Green* 216),

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on the statute of that State, which, with a slight verbal addition, is a transcript of the statute of Westminster. And, in short, wherever trial by jury and Courts of Error have a place in the same system of jurisprudence, and the forms of the common law are observed, and a bill of exceptions is the prescribed mode of bringing under revision the proceedings of the inferior tribunal, a specification of the alleged errors in such tribunal has been, it is believed, always deemed an essential requirement at the hands of the complaining party.

The respondent submits to the consideration of your Honours, that to the generality of this remark the decisions of our own courts furnish no exception, although it is freely admitted that, in regard to bills of exceptions, as well as in many other matters, a very loose practice has, to a great extent, obtained, as for example, in *Thomas v. Wright*, (9 *Serg. & Rawle* 90), where, it appears, the notes of the evidence of four counsel in the cause, together with the notes of the Judge, were referred to in the bill of exceptions instead of an insertion of the appropriate evidence, or a statement of facts settled by the counsel or court. And our reports furnish traces of very extraordinary pretensions on the part of counsel in regard to the proceedings of inferior courts, in connection with the revising superintendence of this honourable court. Thus, in one case, *Stewart v. Huntingdon Bank*, (11 *Serg. & Rawle* 267), it was made the subject of a bill of exceptions, that the Judge refused to suspend the trial of the cause, until the bill of exceptions was drawn up in form and sealed by one of the Judges; and in *Munderback v. Lutz*, (14 *Serg. & Rawle* 125), the court was moved for a rule to show cause why a *mandamus* should not issue, commanding the Judge who had presided on the trial below, to furnish his notes of the evidence, for the purpose of having them transcribed for the use of counsel in reference to the bill of exceptions, or its substitute, under the Act of 24th February 1806. But no case has yet arisen which required of the revising courts any action or decision directly on this question. On two occasions, at least, we have the opinion of Mr Justice DUNCAN, concurring in the fullest manner with the construction of the statute of Westminster, already so frequently adverted to; the one in *Thomas v. Wright*, (9 *Serg. & Rawle* 91); the other in *Stafford v. Walker*, (12 *Ibid.* 196). And in *Reigart v. Ellmaker*, (14 *Ibid.* 124), this honourable court, consisting then, as now, of five Judges, pronounced, through the late chief justice, an opinion in respect to the construction of the Act of Assembly of the 24th of February 1806, which, it is confidently submitted to your Honours, is equivalent to a full recognition of the principle which the respondent has asserted in refusing to allow the pretended bill of exceptions, alleged by the petition to have been exhibited and required of him to be allowed. It is there decided, that the true meaning of the Act of Assembly mentioned, was, that when a Judge delivered an opinion on mat-

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ter of law, he should, if requested, reduce his opinion, with his reasons for it, to writing, and file it of record. This, it is said, in that instance, "was done, as to several specified points, on which an opinion was requested by the defendant's counsel. But this, it seems, was not deemed sufficient. The Judge was requested to reduce his whole charge to the jury to writing, and file it. There is nothing in the Act of Assembly which authorizes such a request, and the Judge was very right in declining to comply with it." And the reasons which are there assigned by the court, demonstrate, in the most convincing manner, the impropriety of such a requisition, whether under the Act of Assembly which requires the opinion of the Judge to be filed of record, or upon the statute of Westminster, where the matter complained of is to be exhibited through the medium of a bill of exceptions. "In a charge to the jury," says the chief justice, "the Judge sums up the evidence and lays it before them, with such observations of his own as he thinks pertinent. I believe no Judge reduces his whole charge to writing before it is given, and, indeed, he could not do it without ruinous delay. And after it is given, it would be impossible for a man of the most tenacious memory to recollect all that he has said on the facts of the cause. And even if it were possible, it would be improper to burthen the record with a quantity of unnecessary matter. It is the business of the counsel who requests an opinion to be filed, to specify it. Several opinions on matter of law may be delivered in one charge. Some of these may be objected to, and some not; but at all events, the Judge should be informed what the opinion is, which he is desired to reduce to writing, &c., and then it is his duty to file that opinion, with his reasons, and no more."

It has never been supposed, so far as is known to the respondent, that the Act of 24th February 1806, imposed restrictions upon a party dissatisfied with the charge of a Judge, which were not applicable to a party under similar circumstances seeking redress through the medium of a bill of exceptions. And relying upon this view of the subject, the respondent would have deemed it altogether superfluous to have done anything else by way of answer to the petition exhibited to your Honours, except to recall the decision in *Reigart v. Ellmaker* to your Honours' recollection. But he finds in the fact that your Honours have granted the rule to show cause in this case upon the bald allegation in the petition, that a general exception to the whole charge to the jury in the case of *Man v. Drexel* was refused, reason to suspect that he has mistaken the import of the decision in *Reigart v. Ellmaker*, or over-estimated its value, or imagined an analogy, in the purpose of the Act of 24th February 1806, and in that of a bill of exceptions, which does not exist.

The respondent, therefore, feels bound to show to your Honours, that long before the trial of *Man v. Drexel*, the District Court for

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the city and county of Philadelphia adopted and promulgated the following rule of court, that is to say: "Either party excepting to the charge of the court to the jury, shall, before the rendition of the verdict, state distinctly the several matters of law in such charge to which he excepts; and no general exception to the whole of the charge shall be allowed by the court, but the exceptions to the matters of law so distinctly stated, and those only shall be allowed in the bill of exceptions;" and that this rule was in force at the time of the said trial.

And the respondent shows to your Honours, that when, after the charge to the jury in *Man v. Drexel* had been delivered, the counsel for the said Drexel stated to the respondent, that he excepted to the said charge, the respondent reminded him of the existence of the said rule of court, and informed him that a general exception to the whole charge could not, in consistency with the rule, be taken or allowed, but that it was incumbent on him to specify such part of the instructions to the jury as he supposed to be erroneous in point of law, and that his exception must be restricted to such specification. That thereupon he immediately specified two points upon which he desired to except. That the respondent replied, that as to one of these points, it was rightly taken, for it had been ruled as he had stated, and its effect was likely to be adverse to his client, and that this was the only point, it was believed, which had been ruled against the defendant. That in regard to the other point mentioned, he might, if he chose, except to this also; yet it had not been ruled against, but in favour of his client, and that the opposite party had already actually, on that account, taken exception to the ruling on this point, and that it had been allowed. That the said counsel then said he would except to the one point only, and a note thereof was immediately made by the respondent, and it was allowed. The respondent heard nothing more on the subject until near the expiration of the ten days limited by another rule of said court, within which the bill of exceptions was required to be prepared and exhibited to the court. That the respondent apprehending no difficulty in regard to the charge, handed or sent, as is his usual practice, the bill to the opposite counsel, in order that the statement of the evidence might be settled between the counsel. That after a considerable time the bill was returned to the respondent, and he then discovered that an extended statement, purporting to be the entire charge delivered to the jury, had been inserted in the bill, and that an exception had been prepared to the whole charge, without any specification according to the rule of court and the actual transaction on the trial. The bill in this form, the respondent refused to seal, but he copied out with his own hand the point of law which had been excepted to by the defendant's counsel on the trial: and when some time afterwards he saw one of the counsel for the plaintiff, he handed him the bill, [respondent having cor-

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rected the evidence by his notes of the same taken on the trial] that a final comparison might be made by the counsel, and the bill be re-presented to the respondent in proper form for the sealing thereof by him. It was not until after the lapse of another period of considerable duration that he was informed by the defendant's counsel that he considered himself entitled of right to a bill of exceptions, containing what he deemed to be the entire charge to the jury, with a general exception thereto. The respondent refused to allow such a bill, but apprised the counsel that a bill containing the exception as noted at the trial, and which had been written out for the purpose, he was ready to seal at any time when it might be offered to him, and he is now ready and offers to allow and seal the same.

The respondent thinks proper further to state, that that which was prepared by the defendant's counsel as the charge of respondent to the jury, did not correspond with, but was materially different from, the charge which respondent did deliver. That on this point the respondent cannot be mistaken, for although he did not on that occasion, nor has ever at any time, in relation to any trial, reduced to writing the whole matter of his charge, yet from the notes made by him as preparation for such charge, he has no difficulty, aided by his memory, in ascertaining the correctness or inaccuracy of any charge which may be imputed to him.

And the respondent shows and offers to the consideration of your Honours, that inasmuch as a Court of Error concerns itself with alleged errors in matter of law in the proceedings of inferior tribunals, and not with the general merits of the controversy between the parties as disclosed by the evidence, the rule of court which requires a specification, on the trial, of the matters of law contained in the charge, to which a party excepts, grants to such party every advantage which is called for by a regard for the interest of such party; and that the only difference between the requirement of such a rule and the allowance of a general exception to the charge has reference to the supposed convenience of the excepting party, and nothing more. For the rule of court adverted to allows any and every matter of law alleged to have been erroneously stated to the jury to be excepted to; and by a rule of your honourable court, the plaintiff in error is required to make a written specification of the particular errors which he assigns, and on which he intends to rely; so that the only difference is whether the party shall make his specification at one time or another.

And the respondent shows and offers to your Honours' consideration,—that in respect to the convenience of counsel as to the point of time at which the exceptions are to be taken, this depends altogether upon the competency of counsel to discharge aright and generally the duty which appertains to the office of an advocate, which he has assumed, and especially upon his fitness

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and ability to fulfil the trust confided to him in the support or defence of the particular cause which he has undertaken to conduct. That to counsel gifted with the appropriate endowments of mind, and furnished with the requisite legal erudition, the knowledge which, if not possessed before, must be acquired during the trial, of the facts of the cause and the questions of law which thence arise, will enable him to specify, on the conclusion of the charge, the supposed or suspected errors therein more readily than at any future period.

And the respondent would further offer to your Honours' considerations,—that of necessity, from the constitution of a Court of Error, it is imposed upon such court, not unfrequently, to reverse judgments from very small faults in the charge, such as arise from the use of ambiguous language or the statement of a proposition or principle of law too broadly, and the like; whilst, at the same time, it is quite obvious that such minute error has very slight or no bearing at all on the merits of the cause, and in all probability has had no operation in producing the verdict. Faults of this description, when brought to the notice of a court on a motion for a new trial, are usually disregarded. *Wakely v. Hart*, (6 Binn. 316), is an example of this kind. Being on a motion for a new trial, the error in the charge was deemed unimportant; on a writ of error the judgment must have been reversed. Had the subject of objection been mentioned to the judge before the rendition of the verdict, its force would have been apparent and the mistake corrected, and yet the result of the trial not affected by it. The specification required by the rule of court is calculated to produce and has produced the like beneficial effect. The supposed error, on being pointed out, is at once rectified—the jury properly instructed—unequivocal language substituted for what possibly might mislead—a judicious verdict rendered, and a writ of error saved.

The respondent, confiding in the justness and force of the suggestions already made, in conclusion, nevertheless, shows and offers to the consideration of your Honours, that the allowing of a general exception to the charge or the requiring of a specification of the errors alleged, is a matter which concerns the practice of the inferior court, and therefore, upon settled principles well known to your Honours, cannot be the subject of revision at all by a Court of Error. Upon this, as well as upon the other considerations submitted to your Honours, the respondent prays that the rule upon him, founded on the petition of Francis M. Drexel, and granted by your Honours, to show cause why a peremptory mandamus should not issue, commanding the respondent to sign the bill of exceptions tendered to him in the case of *Man v. Drexel* by the counsel of said Drexel, with the general exception therein set forth, be discharged.

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Jack, for the rule.

1. The power of this court under the constitution, as a Court of Errors, necessarily embraces the right to issue this writ to any court to which a writ of error lies. "The judicial power of this commonwealth shall be vested in a Supreme Court," &c.; *Str. Purd.* 32, (Ed. 1841). It is the clear intention of this section of the constitution to establish, by the use of the term "Supreme," the authority of this court over all others; and if any doubt was entertained on this point, it must be removed by the clause in the 4th section of the same article, which says "The jurisdiction of the Supreme Court shall extend over the State." Being then a court of errors and appeals, with the same revisory powers as the Court of King's Bench in England, and forming the last resort of the suitor for a review of alleged legal errors in the courts below, and the powers of this court being fixed and not contingent, it follows that they must have the power to enforce the inferior judicatories to transmit their proceedings to them for review. As the acts of the judge in trying the cause do not appear on the record, a bill of exception to his conduct in the cause, in receiving or rejecting testimony, narrs., pleas, &c., and containing his instructions to the jury, forms the medium through which the court are to judge whether his functions have been discharged according to law, without legal prejudice to the just rights of the parties. By the statute of Westm. 2, (*App.* 1 *Chit. Stat.* 817), the bill of exceptions is given to the party. It is not restrained by the statute to any particular part of the judge's conduct in the cause. The words of the statute are: "doth allege an exception." It is therefore the clear right of the party to make his exceptions as he thinks proper. It is for this court to say whether they be good or bad in law. If therefore a bill of exceptions be made and tendered to the judge and he refuses to sign them, if this court cannot compel him to perform this official duty, the jurisdiction of this court as a court of errors is gone. It could never have been the intention of the constitution to have conferred so important an authority.

But we are not without precedent for this rule. In *Ex parte Crane*, (5 *Peters* 192), which was an application for a similar rule, Chief Justice MARSHALL decides this very point. He says, "A doubt has been suggested respecting the power of the court to issue this writ. We have determined that the power exists. In England the writ of mandamus is defined to be a command issuing in the king's name from the Court of King's Bench, and directed to any person, corporation or inferior court of judicature within the king's dominions, requiring them to do some particular thing therein specified which appertains to their office and duty; and *Blackstone* (3 *Comm.*) says: 'It is the peculiar business of the Court of King's Bench to superintend all inferior tribunals, and therein to enforce the due exercise of those judicial or ministerial

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powers, with which the crown or legislature have invested them: and this not only by restraining their excesses, but also by quickening their negligence, and obviating their denial of justice.' It is, we think, apparent that this definition and this description of the purpose to which a mandamus is applicable by the Court of King's Bench, as supervising the conduct of all inferior tribunals, extends to the case of a refusal by an inferior court to sign a bill of exceptions;" and the Judge continues, "That a mandamus to sign a bill of exceptions is warranted by the 'principles and usages of law,' is, we think, satisfactorily proved by the fact, that it is given in England by the statute of Westminster 2, and is so, in fact, termed in the books." See also to the same point, 2 *Johns. Cas.* 118; 6 *Johns.* 279; 1 *Caines* 511; 2 *Ibid.* 97; the New York statute being an exact transcript of the statute of Westm. 2. Chief Justice (afterwards Chancellor) KENT, in delivering the opinion of the court, said, (all these being similar applications), "We have the general superintendence of all the inferior courts, and are bound to enforce obedience to the statutes, and to oblige the subordinate courts and magistrates to do those legal acts which it is their duty to do. There is no reason why the awarding of this particular writ does not fall within the jurisdiction of this court." To the same point may be cited 1 *Serg. & Rawle* 195; *Lawlor v. Murray*, (1 *Sch. & Lef.* 75); *Rex v. Barker*, (3 *Burr.* 1265). The learned Judge, however, in his answer, very properly yields the question of jurisdiction. The point has been made, but never decided in our own courts.

2. What is the character of the writ awarded in the register by the Chancellor in such a case? In *Ex parte Crane*, before referred to, Judge BALDWIN says, speaking of the writ founded on the statute of Westminster 2, "It is a sort of mandatory writ;" again, "and in granting the writ, the Court of Chancery act as much judicially as the Court of King's Bench does in granting a mandamus." In *Sikes v. Ransom*, (6 *Johns.* 280), Chief Justice KENT says; "It is in effect a writ of mandamus; and so it is termed in the books (*Bac. Ab.*, title "*Mandamus*," *E.*); and in *Lawlor v. Murray*, (1 *Sch. & Lef.* 78), the Lord Chancellor, speaking of this writ, says, "It is a writ founded on the right of the crown to compel its officers to pay obedience to the statute; it is therefore a sort of prerogative writ." And at page 79 he says, "It is called a mandatory writ, as it unquestionably is." All these authorities show that a mandamus from this court and the writ from the register are substantially the same, and the rights of the parties are identical; for a false return to the Chancellor's writ an action lies; for a false return to a mandamus here an action lies.

3. The injured party can have no remedy against a judge who refuses to sign a bill of exception until a return is made to this writ. It is indispensable then to the maintenance of the party's rights. The bill of exceptions being given by the statute of West-

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minster, and this writ being given to compel performance, no action lies until the return of the writ, and only lies for a false return.

4. As to the cases cited by the learned Judge, *Ex parte Crane* sustains his position only in part. Judge JOHNSON went with the majority of the court, but declared "that he thought the whole charge ought to come up." The motion was refused on other grounds. The case in *Kirby* goes entirely on the ground that the bill was tendered too late, being after verdict. *Watson v. Watson* decides that the bill is defective, because it brings up no points—nothing distinctly for review; and *Picket v. Allen* decides that the point not having been made below, cannot be made in the court above. That is in the teeth of all our decisions. *Van Gorden v. Jackson* decides that a bill of exceptions to a Judge's charge does not lie, and is opposed to all our decisions. *Frier v. Jackson* goes on the same ground. In both these cases the majority of the court decided against this position. *Jackson v. Cadwell* is the same case. In *Law v. Merrills* it was held not competent to assign errors, because no exceptions were taken to the charge. *Coxe v. Field* was decided on the State statute.

5. The right of counsel to the general exception and the whole charge. The point was distinctly made in *Burr v. Sim*, (4 Whart. 150), and counsel did not dream of defending the refusal of the court below upon this part of the case; they offered no argument to sustain it, and Judge KENNEDY informed the counsel of the plaintiff in error that they need not contend the point. It was well understood at the bar that this right to a general exception was sustained by this case. In fact the practice of this court always has been to allow the assignment of errors, whether made below or not. Thus in 2 *Binn*. 323, Chief Justice TILGHMAN says, "It is open to the plaintiff in error to assign error in an opinion on any matter material to the issue appearing in the bill of exceptions, although not particularized in stating the exceptions:" and in 10 *Serg. & Rawle* 62, "The court always reserves to itself the right to correct an error which stares them in the face, when they think the justice of the case requires it." And in 5 *Watts* 205, "If it appears by the record that the plaintiff has no cause of action, this court will reverse a judgment although the point was not made in the court below." These authorities are all inoperative so far as the bill of exceptions goes, if the party is deprived of the general exception bringing up the whole charge. Again, how is the point taken to be made intelligible if standing alone? Nothing is more capable of an ungenerous interpretation and unfairness towards the judge; the justice of the case requires the whole charge; the exceptions are then fairly stated and examined. Then, as to the rule of the District Court requiring counsel to specify the particular exceptions made, and against allowing a bill of exceptions containing the whole charge:—

6. It is contended that the District Court have no authority to

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establish any such rule; and it is unconstitutional, because it is in direct conflict with the rules of this court, which require the errors to be assigned here. This rule calls on the party in effect to assign the errors in the court below. That is usurping the jurisdiction of this court. In *Barry v. Randolph*, (3 Binn. 278), Chief Justice TILGHMAN says, "Every court has a right to make rules for the transaction of its business, provided such rules are not contradictory to the law of the land; and Judge YEATES says, "No rule can be made which would divest a citizen of any legal right;" and in *Boas v. Nagle*, (3 Serg. & Rawle 253), this court said, "A rule cannot be established in contravention of any Act of Assembly." And in *Rush v. Turner*, (4 Yeates 362), "No rule can abridge the rights of individuals secured by positive laws." Also in 11 Serg. & Rawle 131, this court decided that a rule of court which was a Statute of Limitation was void. All these authorities show conclusively that any rule of the inferior court which restricts the court above from a complete review of their proceedings, whether apparent on the record or on the bill of exceptions, is an unconstitutional rule, against law, and therefore void. It must be obvious to every practitioner that a charge on the whole law and facts, when taken together, may present a clear error in law, yet divided and subtracted into parts, may not exhibit the same result.

7. This rule of the District Court is of no practicable utility to the practice of that court; it is no advantage to the judge or the counsel on the opposite side. After the judge has charged, it is not to be expected that he will change his opinion in the face of the jury. It is of no importance to the opposite counsel, as the counsel complying with the rule cannot be held to those exceptions in the court above—they can assign other errors.*

* *Statute of Westminster 2d*, 1 *Chilly's Statutes*. "When one that is impleaded before any of the Justices doth allege an exception, praying that the Justices will allow it, which, if they will not allow, if he that alleged the exception do write the same exception, and require that the Justices will put to their seals for a witness, the Justices shall so do; and if one will not, another of the company shall. And if the King, upon complaint made of the Justices, cause the record to come before him, and the same exception be not found in the roll, and the plaintiff show the exception written, with the seal of a Justice put to, *the Justice shall be commanded that he appears at a certain day*, either to confess or deny his seal. And if the Justice cannot deny his seal, they shall proceed to judgment according to the same exception, as it ought to be allowed or disallowed."

Translation of the Writ in the Register.

The King, To———, Greeting:

Whereas in the Statute of Westminster the 2d, among other things it is contained, that in any suit before our Justices, where an exception is taken, and the party prays the Court to allow the same, if he refuse to allow the same, and the party making the exception puts his exception in writing, and requires the Justice to put his seal in testimony of the same, if he should refuse so to put his seal, some one of the assembly may place it, according to the full meaning and words of the statute; and now we having received a grievous complaint of one W, that

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The opinion of the Court was delivered by

GIBSON, C. J.—It is strange that the writ of mandamus should still be supposed to give remedy in a case like the present. It is true that it does so in New York, as appears by *The People v. The Judges of Washington County*, (2 Caines' R. 97), the secret of which is, that the matter is regulated there by a particular statute of the state. I have seen no case, English or American, which indicates that it may be used for the purpose as a prerogative writ. In England it certainly may not; for we are told by Lord COKE, (2 Inst. 426), that the proper remedy is a writ specially framed on the stat. Westm. 2; and accordingly we find a form for it in the Register, page 182, setting forth the circumstances of the case, and commanding the judges, if they be true, to affix their seals to the bill. If they return that they are untrue, the superior court proceeds no further, but leaves the complainant to his action for a false return, in which their truth is tried according to the course of the common law. Such a remedy certainly resembles an alternative mandamus; still it is not a prerogative writ, but specific, grounded on a statute. That no instance of its use is to be found, was said by counsel in *Bridgman v. Holt*, (Show. P. C. 122), to be because no English judge had ever refused to allow a proper exception. However that may be, recourse might certainly be had to it there, and a writ might be framed in conformity to it here. But if we have no precedent for an actual recourse to it, neither have we a precedent for a successful recourse to a mandamus as a substitute for it. In place of that, it was very seriously doubted in *The Commonwealth v. The Judges of the Common Pleas*, (3 Binn. 273); *The Same v. The Same*, (1 Serg. & Rawle 187); *Morris v. Buckley*, (8 Serg. & Rawle 211); and in *Kolb's Case*, (4 Watts 154), whether a mandamus lies to a county court for any purpose whatever. The point has not been decided, nor is it necessary to decide it now; for it has never been sup-

lately, in a certain amicable suit in our Court in London, before you, according to the custom of said city, between T and the aforesaid W, that the said W render to the said T his reasonable purport or share of moneys of the said T, from such time as he was receiver of the same; various exceptions were taken and alleged, and those exceptions have been put into writing, for that you refuse to allow the same, and have been repeatedly required and prayed to affix your seal to those exceptions, according to the form of the aforesaid statute. Yet so it is, that you have objected and still do object, and refuse to affix your seal to the aforesaid exceptions, to the grievous injury and manifest prejudice of the said W. Wherefore he has prayed you to provide a remedy for him. And because we are desirous that the aforesaid statute be strictly observed, and that justice be done to the said W in the premises, We command you, that if so it be, that you affix your seal to the aforesaid exceptions, thus had before you in the aforesaid suit, by the aforesaid W, in writing, as is the custom, according to the form of the statute aforesaid; and hereof fail not, under the penalty in such cases impending. T, &c.

C. B.

[Extract from "The Registrarium Ovium Brevium, of 1595.]

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posed that it lies to compel performance of a judicial function in a particular way. Thus it was held in the first of the cases just quoted, that it lies not to compel the reception of an appeal; or in the second, the admission of an attorney to the bar. So far was the principle carried in *Griffith v. Cochran*, (5 Binn. 87), that it was applied to the function of an executive officer acting in a deliberative capacity. Is not the sealing of a bill of exceptions a deliberative act? The exception is written by the party who alleges it, and the fact is judged of by him who, of all others, is most competent to determine whether it is truly written, because his eyes and ears have taken in the whole transaction. And yet counsel come here for the interference of a court which knows nothing of the matter but what it gleans from affidavits, to compel him to act in a particular way, though at his peril, on an assumption of facts and circumstances which he may know to be unfounded. But that is not all. We have used the mandamus only as a process in the last resort: never where there was a specific remedy. Thus it was refused in *The Commonwealth v. Rosseter*, (2 Binn. 362), where the object was to restore the relator to a pew in an incorporated church, because he had a remedy by action for a disturbance; and in *The Commonwealth v. The Canal Commissioners*, (2 P. R. 518), it was said that though the writ is grantable of common right, yet it is only where it is necessary to prevent a failure of justice. The principle is more emphatically asserted by Lord HARDWICKE, in *The King v. Wheeler*, (*Cases Temp. Hardw.* 99), in saying, "the reason why we grant these writs is to prevent a failure of justice, and for the execution of the common law or of some statute, or of the King's charter, and never as a private remedy to the party, except on the statute of Anne, and that stands on another footing: nay, the old cases went so far as to refuse a mandamus in all cases where an assize lay; and though the court is not so strict now-a-days, yet it shows in what light these writs are considered." Now the writ grounded on the statute of Westm. 2, would be much more manageable than an assize. Again, in *The Commonwealth v. The Commissioners of Philadelphia County*, (5 Rawle 75), the court would not award a mandamus to settle the validity of an election, but put the parties to a *quo warranto* in order to try the contested facts by a jury. As, then, there is a specific remedy for the case before us, by the form of writ in the Register, the rule might be discharged for that reason alone. But we are bound to take the facts returned to be incontrovertible, and the judge has returned what would prevent us from awarding this extraordinary writ were we otherwise competent in such a case to do so.

Rule discharged.

Jones *against* Wardell.

Notice dated Rochester, New York, Dec. 28th, 1841, of protest on that day for non-payment by drawee of a bill of exchange dated at New York, was sent to New York, where it was mailed on 3d January, 1842, and on the 4th was delivered in Philadelphia, where the drawer resided, to a person of the same name, and did not reach the drawer until the 8th. *Held* sufficient notice to charge the drawer.

Reasonableness of notice to the drawer of dishonour of a bill is a question for the court.

ERROR to the District Court for the city and county of *Philadelphia*, in which Charles E. Wardell brought suit against William D. Jones, on the following draft, a copy of which was filed:

New York, August 25th, 1841.

\$379.59 Four months after date, please to pay to the order of Ch. Wardell & Co., three hundred and seventy-nine dollars and fifty-nine cents, value received, and charge the same to account of goods sent you by them.

To Mr ABRM. H. JONES, (Signed) WM. D. JONES.
Rochester.

(Written across-face) Accepted, payable at Bank of Rochester.
A. H. JONES.

(Endorsed) Pay W. & J. CURRY, or order.
CHS. WARDELL & Co.

Pay H. WHITE, *Cashier*.
W. & J. CURRY.

Pay RALPH LESTER, *Cashier*.
H. WHITE.

The following affidavit of defence was filed in February 1842:
“William D. Jones, the above-named defendant, being duly sworn, says, that he has a just and legal defence in the above case, and that it consists in the following facts, namely: first, the notice of non-payment by A. H. Jones is in the following words:

Rochester, N. Y., Dec. 28th, 1841.

\$379.59 Take notice that A. H. Jones' acceptance of a draft drawn by you for three hundred and seventy-nine dollars and fifty-nine cents, was this day protested for non-payment, and that the holder looks to you for payment thereof.

Yours, &c.

To WM. D. JONES. (Signed) WM. S. WHITTLENY,
Notary Public.

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This notice was mailed in the city of New York, upon January 5th, as appears by the post-mark directed and superscribed Mr William D. Jones, Philadelphia, Pa., 12 $\frac{1}{2}$, and was delivered from the post office of Philadelphia, to another William D. Jones besides this deponent, to whom it was brought by a coloured man from the said Jones, and was only received by this deponent on Saturday, January 8th, 1842, about 12 o'clock of that day. Your deponent, therefore, avers that he has not had such early and sufficient notice of the non-payment of the draft upon which the above suit is brought as he is and was entitled to by law."

The court entered judgment for want of a sufficient affidavit of defence.

The following supplementary affidavits were filed subsequently to the judgment :

"Wm. D. Jones, dry-goods merchant, being duly affirmed according to law, deposes and says, that after inspecting his memorandum of postage, to the best of his knowledge and belief, he received the annexed paper, marked A, upon the 4th January last past, as he finds 14 $\frac{1}{2}$ cents charged at that date against William D. Jones, painter : but the deponent cannot recollect at what time the said paper was handed over to the said Wm. D. Jones, painter."

"Wm. D. Jones, painter, the above named defendant, being duly sworn, says he did not receive said paper marked A, until the 8th January last past."

Errors assigned :

1. That the affidavit of defence and supplemental affidavit and certificate, filed in the court below, disclose an ample and complete defence, and entitled the plaintiff in error to a trial by jury.

2. That the notice of dishonour was not forwarded direct to Philadelphia, but first to New York, and then remailed to Philadelphia, which was not the most direct notice that ought to have been given of the dishonour.

H. Hubbell, for the plaintiff in error, contended that reasonableness of notice was a question of fact for the jury. *Gurly v. The Gettysburg Bank*, (7 *Serg. & Rawle* 324). The notice of dishonour, which was sent from Rochester to New York, and thence remailed to Philadelphia, was not the most direct that could have been given.

Gilpin, contra. The notice was sufficient. It reached Philadelphia on the 4th January, and must have been mailed at New York on the 3d ; and such is the post-mark. If mailed at Rochester on the 29th December, it could not reach New York till the 1st, 2d, or 3d of January, and Philadelphia about the 4th. There is nothing in the affidavits to show it could arrive sooner. The defendant is bound to show in his affidavit that more than reason-

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able time has elapsed to enable the holder to give notice to the different drawers and endorsers in succession; and a loose allegation of want of notice is not sufficient.

The opinion of the Court was delivered by

ROGERS, J. — This is a suit on a bill of exchange dated New York, drawn by the defendant, William D. Jones, on Abraham H. Jones, made payable to the order of Charles Wardell, by him endorsed to the Syracuse Bank, and by the Syracuse Bank to the Bank of Rochester. On the 28th December 1841, the bill was protested for non-payment. On the 3d January 1842, notice of the dishonour was mailed in the city of New York, which reached Philadelphia, where the drawer resided, on the 4th January 1842. In consequence of a mistake, there being two persons of the same name, it did not reach the defendant until the 8th January 1842. By whom, or in what manner, or to whom it was transmitted to the city of New York, or by whom it was mailed to Philadelphia, does not appear. The supposition is that the business was transacted in the usual course; that is to say, that the notice of protest was sent to the Syracuse Bank, by them to the payee in New York, by whom it was sent by mail to the drawer, who resides in Philadelphia. The Bank of Rochester, to whom it was sent for collection, in the absence of all information to the contrary, had a right to suppose that the parties to the bill lived in New York; it would therefore be unreasonable to require that the notice should be sent direct to the drawer: and this explains the reason of the direction which the notice took. As a matter of law, therefore, we incline to the opinion that this was a reasonable notice of the dishonour of the bill; for, allowing one day to each of the parties to the bill, and one day for Sunday, which was an intervening day, greater diligence could not reasonably be required, when it is remembered that Rochester is four hundred miles from New York, and consequently five hundred from Philadelphia, where the drawer resided. The time it reached the defendant is no consequence, as the delay arose from a circumstance which the payee could not control; it is sufficient proof of notice that it was in due time sent in a letter, without proving that the letter was received. *Smyth v. Hawthorn*, (3 *Rowle* 356). All the plaintiff had to do was to set out the bill, which made it incumbent on the defendant to state in his affidavit the facts on which he relies for his defence, and unless there be a good defence, the plaintiff is entitled to judgment: In *Gurly v. The Gettysburg Bank*, (7 *Serg. & Rawle* 324), it is held that the reasonableness of notice to an endorser of the non-payment of a promissory note, is a question of fact for the jury. This case was decided in 1821; but since then, in consequence of the facility of communication arising from regular mails, and the internal improvements of the country, sounder notions have been entertained. Where there is a question as to the facts, the jury

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must decide: but where the facts are conceded, the court must determine whether the notice is reasonable. This was the law, as laid down by Lord MANSFIELD in *Tindal v. Brown*, since adopted and recognised by this court in *Brittain v. The Doylestown Bank*, (5 *Watts & Serg.* 98).

Judgment affirmed.

Brown against Arrott.

In a suit by a principal abroad against his factor here, seeking to charge him with losses occasioned by his negligence, the defendant cannot, to show he had kept the plaintiff informed of his doings, give in evidence a deposition stating that the defendant gave the witness particular instructions to see the plaintiff and inform him of the state of his consignment particularly, and the sales made, when the witness states he had no copy of account sales, and showed none to the plaintiff, and sales had long before been made of which no account had been sent.

A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interests.

Evidence is not admissible on the part of a factor, in a suit by the principal against him founded on the factor's negligence, to show that it is not usual for factors to transmit to their principals monies received by them as long as any part of the consignment remained unsold, or if sold, as long as any part of the monies remained unpaid, though the honesty of the agent is not disputed and there is no ground to believe the monies might thereby be lost.

A factor is bound to remit to his principal the monies received from sales of a consignment, unless there be an agreement or custom of trade, and if the latter be himself the factor of a principal abroad, he is bound to call on his factor in this country to transmit monies received when he is informed of it, and if the money is lost by neglect to do so, he is answerable.

In October or November 1822 the defendant was apprised of a sale by his agent in Boston payable in February or March. In May the defendant wrote stating he expected an account and remittance. Six days after he wrote that he need not make a partial remittance, but to push the sales to a close and remit the whole at once. In March the agent acknowledged to him his inability to meet a note to the defendant, payable in a few days, and no advice was sent by the defendant to the principal abroad till the agent became insolvent. *Held* that the defendant was responsible for the loss of the goods and monies.

Where on the facts presented the defendant is liable for a loss occasioned by his negligence as a factor, the onus of proving what the actual loss was, lies upon him and not on his principal, and in the absence of such proof the full value of the goods, or at least of the money produced by their sale, is the measure of damages.

The factor sold goods to J. F. on a credit of six months, taking a note payable to himself, including in it a debt owing to himself, and afterwards released to J. F. and came in under his assignment. *Held* that he made the debt his own by blending it with his own money and releasing J. F. without authority.

ERROR to the District Court for the city and county of Philadelphia, in an action of assumpsit brought by Andrew Brown

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against James Arrott, in which a verdict and judgment were rendered for the defendant. It was the same case which is reported at large in 6 *Whart.* 9, by the name of *Arrott v. Brown*, a verdict having passed in the first trial in favour of the plaintiff, Brown, which was there reversed, and on the second trial the verdict passed for the defendant, Arrott, on which the present writ of error was taken out by the plaintiff, Brown. The facts of the case are fully stated in 6 *Whart.* 9, and it will only be necessary to report the new evidence given on the present trial.

The defendant, with a view to show that there was nothing calculated to excite the defendant's suspicion in Young's omission to remit the amount of the sales made in the fall of 1822, proposed to prove by Samuel Comly and others "that in consignments to commission merchants between the different cities of the United States, and between Philadelphia and Boston, it is not, under ordinary circumstances, the practice to make or require partial remittances of occasional sales made, before closing sales of consignment." The plaintiff objected to this offer, and contended that it was illegal. The judge decided that when it was reduced into the form of a question to the witness he would allow it.

Samuel Comly then testified that he was a commission merchant and had, to a large extent, received and sent goods on commission, to and from other cities of the Union.

The defendant then asked the witness, "From your experience of sales by a commission merchant, is it usual or not to make remittances before closing sales of consignment without special directions to do so?" The question was objected to by the plaintiff, but the objection was overruled by the court, and the plaintiff excepted. The witness then answered, "It is not usual."

The defendant then asked the witness the following question: "Under ordinary circumstances, do parties consigning goods to a commission merchant require payment of the amount of occasional sales of parts of a consignment before closing sales of the consignment?" This question was also objected to and the objection overruled by the court, who sealed an exception. The witness then answered: "Under ordinary circumstances, I think they do not draw for partial sales till the sales are closed."

Question. Is your answer to be understood as applicable to cases in which part of the sale is made in the fall, and part postponed to the spring? (Objected to as before.) Answer. Yes, it is; where there is confidence between the parties it is not usual to draw. Such has been my practice.

This witness further testified: "I have done business with other parts; with New York, Boston, Baltimore and Charleston. I would draw upon them for sales; they would consign to me and draw upon me. Our sales were rendered to each other whenever an invoice was closed. As a general rule, this closing would occupy from one month to two or three or four months. My bu-

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business here was all on a large scale; and with the houses here, at the eastward, a reciprocal business."

Re-examined. I have also done a considerable business for the neighbouring cotton manufacturers. Sometimes in small amounts.

Joseph Cabot testified, under the same exception to his testimony: "I have been and still am a commission merchant. In my mercantile business have also been in the habit of consigning goods to others for sale. Answering from my experience, it is not customary to remit until sales are closed. I have no doubt about the fact that the custom is to remit only at the close of the sales, unless specially directed to do it. There have been cases where parties wanting money have requested remittances as sales are realized. Under ordinary circumstances I should think it not customary to do so, (that is, where advances are not asked.) My answer has reference to all sales; would not be excluded by applicability to cases of sales, part in fall and part left for spring. I came to Philadelphia from Boston, in 1815. I had been in business in Boston before I came here."

Cross-examined. (In answer to a special question.) If I had received goods on consignment from abroad, and had advanced on them, and had sent part of those goods elsewhere and had heard of sales of part of those goods, I should have considered it my duty to call in the proceeds at maturity.

Re-examined. (In answer to a specific question.) I mean this answer in a case where I had made a special advance on the particular goods.

Re-cross-examined. (In answer to a question.) But if I had made a remittance on general account, I should consider the case the same as a special advance, and my duty to call in the funds the same.

The defendant offered to read the deposition of David Arrott of New Orleans, merchant, taken Oct. 3, 1828. The plaintiff objected to the following italicised portions of the deposition as illegal testimony. The judge overruled the objection and decided that the parts objected to should be read, and sealed an exception.

The deposition was then read as follows: In the month of July 1823, he sailed for Europe from Philadelphia. For six years previously he had lived with the defendant as his clerk, and was intimately acquainted with his concerns. He knew of several consignments to the defendant by the plaintiff in the spring of 1822, and that the defendant sent a part of said goods to Boston, and consigned them to James Young at that place for sale, the market being bad for the goods at Philadelphia. He sent at the same time to Young some of the goods of the plaintiff, and some goods which had been consigned to the defendant by David Lum-gair * * * (the part omitted here being objected to by the plaintiff, was not read in evidence,) * * * (verifies the invoices of the goods:) * * * (verifies certain letters from

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plaintiff to defendant :) * * * On the day of deponent's departure, or the day before, defendant received an account of sales, but no remittance. *That the defendant gave this deponent particular instructions to see the plaintiff, and to inform him of the state of his consignment particularly, and of the sales which had been made at Boston,* and gave deponent a short letter of introduction to the plaintiff, and a recommendation to Mr. Brown, of deponent's house at New Orleans, which was just then established. That shortly after the deponent's arrival in England, he went to Scotland, and in August or September, 1823, he visited the plaintiff at Dundee, *and made him particularly acquainted with the state of his consignment, and of the sales made at Boston.* The plaintiff inquired of deponent what prices the goods brought at Boston, and the deponent informed him; a good deal of conversation took place between the plaintiff and the deponent, but the plaintiff made no complaint or objection to the defendant's having sent the goods to Boston for sale, nor to any other particular of the defendant's conduct in the management of the business. That the deponent shortly after went to England, and whilst there he received a letter from the plaintiff, inquiring of him if he had heard from his uncle, the defendant, which letter the deponent answered, and in that letter, or verbally in a visit which he shortly afterwards made to Scotland, again he informed the plaintiff that he feared something had happened in Boston, as he heard incidentally from a friend at New York that his uncle had passed hastily through that place on his way to Boston.

Cross-examined.—The goods were sent to Boston in April or May 1822. Arrott received no regular account-sales until the sales were about to be closed. Deponent thinks he was advised of sales as they were made, by letter, but no regular account current was forwarded until the close * * * (the part omitted here was not read in evidence, being applicable to that part of the examination in chief which was objected to by the plaintiff and not read.) * * * When the deponent was at Dundee, he had no copy of account-sales from Young, and of course showed none to plaintiff. Deponent cannot say how many packages of goods had been sent, or how many he informed plaintiff had been sent. Deponent has not the letter from plaintiff to him; it is now in New Orleans, if in existence. Deponent sailed for Europe the 20th July 1823. About the time deponent went to Europe he had established himself in business, and had left the defendant's counting-house.

Samuel Snelling sworn, (under the same exception to his testimony as in the case of Comly). I am a commission merchant; have been so 15 years. I was in business as a commission merchant in Boston. I began business on my own account 20 years ago. On making partial sales it is not usual to make remittances till sales completed. It ought to be said that the custom varies. My

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experience has been to make up sales at closing of the invoice. Whether consignor draws depends upon circumstances, as if an agreement. I should think under ordinary circumstances it is not ordinarily done.

Cross-examined. — By ordinary circumstances I mean where there is nothing peculiar. There is no custom which would render it improper to draw. If sales unclosed for one year it would depend upon circumstances. There is no custom which would interfere with drawing. We generally render our account sales once in the month. Some of our correspondents desire it at the end of the invoice; some at the close of the season, or once in three months. Heretofore we have been generally in advance to our principals, but latterly have adopted a different rule; our practice was to advance about two-thirds, sometimes more. If we charged interest on advances, and had sent part of the goods elsewhere to be sold, we should stop the charge of interest from the maturity of the sales made by our correspondent. If partial sales made, I should not think it necessary immediately to call for the proceeds, but generally at the close of the season. I should ask for the account sales so as to close up my accounts with my correspondents. Leaving the proceeds in his hands would have a tendency to lessen the average due of the whole. When we send goods to a New York house, we desire them to transmit to us the notes endorsed over for better security. Sundry notes for the amount due as per average due time. This is our late practice; adopted since commencement of this year. Formerly, when doing business with commission houses, they would draw on us and we on them. The state of the balance between us on general account would regulate the drawing. I should treat the case of a correspondent for a single consignment as I would others under ordinary circumstances.

Re-examined.—Would you consider the case of a consignment made in the fall, partial sales in the fall, and the balance of goods sold in the spring as an ordinary case? It might be a common case. Do you not believe it is a common case? I do.

Benjamin W. Richards, sworn. (Same exception as before.) I have been a commission merchant 20 years and upwards. It is not usual to make remittances before closing invoices, unless there are special agreements or directions. Under ordinary circumstances parties do not require payment before closing sales of invoice. Suppose a consignment to Boston, part sold at fall sales, balance laid over to the spring; my correspondent a foreign house. Such a case I should consider would fall within the general rule, and it would not ordinarily make any difference which party was debtor or creditor. Interest is generally of course among commission merchants.

Cross-examined.—If I had written to a Boston correspondent on 23d of May, calling for account sales and remittances, and a

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month elapsed without reply, I should think he was deviating from the ordinary course of business. I should look for his reply in three or four mails at farthest. I frequently made advances.

Re-examined.—Two intermediate letters on my part would be deemed a sufficient urgency.

The defendant submitted the following points :

1. There is nothing in the evidence that amounts to a guarantee of sales by defendant, and nothing in the declaration that authorizes the plaintiff to recover on the footing of such a guarantee.

2. The guarantee mentioned in the letter of 9th January 1822, is, upon the proper construction of that letter, referable to the auctioneer's guarantee, and not to any guarantee by the defendant himself, of either auctioneers or purchasers.

3. The defendant is not to be held liable for the debt of Folwell, by reason of having included in one and the same note the amount of this and another sale to Folwell.

4. If the defendant did not until June 1824, communicate to plaintiff the fact that this debt had not been paid, the jury are not for this reason to give in damages any greater amount than the loss or injury, if any, which they may believe to have been sustained by reason of the omission to make such communication.

5. The correspondence authorized the defendant, if he thought it best for plaintiff's interest to do so, to send ten of the plaintiff's 80 bales of goods to Boston, to be sold for plaintiff's account in that city.

6. On this subject and that of the next point, if there are any ambiguities in the plaintiff's letters, he is not at liberty to take advantage of them, and they are not to be construed in his favour.

7. The direction in the letter of 22d May 1822, to take care that the goods should be placed in safe hands, is not to be construed as a stipulation that the defendant should be answerable for the safety or solvency of the party in whose hands he might place them.

8. This stipulation only required that the defendant should use reasonable care in the selection of the agent in Boston, in whose hands he might place the goods for sale in that city.

9. If the standing and character of Young were then fair in the general estimation of men of business in Boston, the jury are at liberty from this circumstance to presume that the defendant used reasonable and sufficient care in selecting him as the agent to sell these goods there.

10. This would be the case, although it might now appear that a few persons having peculiar and secret means of knowledge, were then aware of circumstances unfavourable to the situation of Young, not known to the community generally.

11. The omission of Young to make payment at the maturity of the credit of the amount of any partial sale or sales of which advice may have been given by him to the defendant, does not

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involve defendant in any liability to the plaintiff, unless the jury believe that this circumstance was a departure from the ordinary course of business, or was reasonably calculated to take away confidence in Young.

12. The defendant's omission to require payment of such partial sales at maturity, does not involve him in any liability to the plaintiff, unless the jury believe that the omission was one which would not under such circumstances have arisen in the case of persons ordinarily attentive to similar business.

13. If under the circumstances, persons of ordinary attention to business would at discretion have drawn or not drawn for such partial sales at their maturity, the defendant was at liberty to exercise his discretion upon the subject, and ought not to be held liable for any unforeseen consequences that may have since resulted from omitting to draw.

14. If, after this time, the defendant used all reasonable diligence in the pursuit of Young, and acted throughout according to the best of his judgment, under the advice of counsel, he is not answerable for the debt not having been collected from Young.

15. The defendant not having guaranteed any sales made for the plaintiff, and never having rendered any account charging himself with the sales made by Young, until he rendered the account in which they were re-charged to the plaintiff, with information of Young's failure, is not to be held as having in point of law made Young's debt his own.

16. Although the defendant omitted from the summer or fall of 1823, to the spring of 1824, to communicate to the plaintiff the failure of Young and the situation of this debt, yet his omission to make such communication does not make him liable to the plaintiff for any thing beyond the amount of the actual damage or injury sustained by the plaintiff, if any such damage or injury was sustained in consequence of such omission.

17. If the jury believe that he sustained no loss or injury in consequence of the omission to make the communication, and stood in no worse condition than he would have stood in, had there been no such omission, there is no rule of law which makes it binding upon the jury to find a verdict for more than nominal damages.

18. The letter of 21st June 1824, from the plaintiff to the defendant, was not such a one as required an answer in order to preclude the legal implication of acquiescence in its contents.

The judge charged the jury as follows:

The plaintiff claims to recover in this case the sum of \$4592.72, which is made up of two items, namely: 1. The difference between the amount for which his goods were sold, as stated in the account current, and the amount actually remitted to him, with interest on this difference, after deducting all the usual charges as

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stated in that account. 2. The proceeds of the 80 pieces of his goods sold by defendant after that account was rendered, together with interest, after deducting the usual charges. The defendant, on the other hand, contends that he is entitled to be credited in account with the whole of the amount for which certain of these goods were sold by James Young, of Boston, who failed to remit the proceeds to the defendant; that he is entitled also to be credited with certain expenditures incurred and made by him in prosecuting the claim against Young for these proceeds: and that he is entitled also to be credited with the whole amount of Folwell's note, which Folwell failed to pay and permitted to be dishonoured. If these pretensions and credits be allowed, he brings the plaintiff in his debt, and claims your certificate for the amount which may thus be found due to him. The plaintiff asserts among other things, that the defendant agreed to guarantee the sales, and refers in proof to a particular part of the correspondence. You will recollect the argument; but upon this point it seems to me that the parties themselves thought there was no guarantee.

There are other questions in the case which require your attention to certain rules of law which govern the relation existing between principal and factor. These rules are as follows: Where a factor is employed to make sale of goods on consignment, he is bound not only to good faith but to reasonable diligence. It is not sufficient that he has been guilty of no fraud, or of such gross negligence as would carry with it the insignia or badges of fraud. He is required to act with reasonable care and prudence in his employment, and exercise his judgment after proper inquiries and precautions. If he shut his eyes against the light, or sell to a person without inquiry, when ordinary diligence (that is, that degree of diligence which persons of common prudence are accustomed to use about their own affairs) would have enabled him to learn the discredit or insolvency of the party, he will not be discharged from responsibility to his principal. *Story on Agency* 172-174. On the other hand, where the agent has conducted himself according to the usual course of business, and has employed the required diligence in his agency, he will not be responsible for consequences. *Story* 190. Where the employment of a sub-agent is authorized, he must use the same reasonable diligence in his choice as to the skill and ability of the sub-agent. *Story* 190. Again, it is the duty of an agent to keep his principal apprised of his doings, and to give him notice within a reasonable time of all such facts and circumstances as may be important to his interests. *Story* 196.

Then the question is presented, do any of these rules apply to the facts before us? As to Young's debt. Young resided in Boston. The defendant was bound to sell there only, unless he obtained permission to try another market. He relies on the plaintiff's letter of 22d May 1822, which contained this clause: "If any of my goods are unsaleable with you, you may send a few

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bales to Baltimore, or any of the neighbouring cities, if you think it advisable, taking care to put them in safe hands." On the 22d September 1822, defendant sent on consignment to James Young, of Boston, ten bales of linen goods. It is conceded that the goods were unsaleable here, and that a few bales could be sent to a neighbouring city. It is not denied now that Boston was a neighbouring city; nor that the number, ten bales, were within the authority. Nor is it denied that the letter of 22d May 1822, is not to be construed as containing a stipulation that the defendant should be answerable at all events for the safety or solvency of the party in whose hands he might place the goods. The letter required only reasonable care and diligence in the selection of the person to whom the goods should be sent. Then the question is presented distinctly and fully to the consideration of the jury, whether, in the choice of Young as consignee at Boston, the defendant did or did not use due diligence. He was bound to use that degree of diligence which persons of common prudence are accustomed to use about their own affairs. The outline of the evidence is this. Thompson brought a letter of introduction from Messrs Perkins of Boston. Perit, to whom that letter was presented, introduced him to Arrott. They recognised each other as countrymen and acquaintances. Arrott had Scotch goods consigned to him, on hand. He inquired of Thompson for a fit person to make sale of these goods in Boston. Thompson recommended Young. So far, defendant says, he acted prudently. The plaintiff says, he did not. This is a question for the jury to decide upon. But again, defendant says, that subsequent inquiries show that Thompson's recommendation of Young was well founded. The plaintiff denies this. Here again the jury must decide. If the jury agree with plaintiff on these points, then Arrott is responsible on this ground for any damage the plaintiff actually sustained by reason of defendant's want of due diligence in this matter. If the jury agree with the defendant on this point, then the plaintiff is obliged to confine himself to other grounds; namely—the alleged omission of the defendant to give material information, and the alleged want of proper diligence in conducting the business with Young.

As to the first, the rule has already been stated to be, "That it is the duty of an agent to keep his principal apprized of his doings, and to give him notice within a reasonable time of all such facts and circumstances as may be important to his interests." Here the consignment to Young was made in September 1822. No communication of any kind to plaintiff is made until David Arrott's visit to Dundee in August or September 1823. David Arrott had then a conversation with the plaintiff, and stated probably all he could recollect without documents before him. But, at that time, it seems fair to conclude, he did not suspect Young's insolvency; and he certainly did not communicate any grounds of suspicion to

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Brown. The evidence shows that it was at a subsequent period that his own fears were awakened. The plaintiff says, this communication is unimportant, as to the material matters. The defendant deems it material. This is for the jury. But the plaintiff alleges again, that though in the hurry of his departure in July 1823, from Philadelphia, David Arrott did not notice the difficulties on the face of the account just received from Young, yet that the defendant, on reflection and examination, did, and immediately drew on Young for \$1350, at three days' sight: that in a few days this draft proved Young's insolvency; and that it was not until the 7th of May 1824, nine months after Young's insolvency was known to him, that he wrote to the plaintiff, or gave him any notice on the subject. The plaintiff, on receipt of this letter of 7th May 1824, promptly replied by letter of 21st June 1824, stating that he held the defendant responsible for the debt made in Boston. Now it is conceded by the defendant, that he was guilty of an omission of duty here; the rule being, as before stated, that a factor is bound to keep his principal informed of all material occurrences in the agency.

The great point of dispute here is the measure of damages. You have heard of former trials of this cause. As you are trying the case with the aid of new light, it would not influence you, I am sure, were I to state what the former jurors did. But as it would do no good, and would be an irregularity, I refrain from referring to their verdicts. As to the law, however, I may make a remark or two. This case was originally tried before the late learned President of this court, Judge BARNES. He stated the law to be, that the jury should determine what amount of damage, if any, a principal actually sustained from want of notice from his agent. Before the same Judge in this court another case, *Harvey v. Turner*, had also been tried, in which he had laid down the law in the same way, and on facts which he believed brought the two cases within the same class. *Harvey v. Turner* was taken to the Supreme Court, and reversed. (See 4 *Rawle* 229.) A rule for a new trial in this case was still pending. Judge BARNES had left the bench; but on hearing what had been decided on the writ of error in *Harvey v. Turner*, he took care to inform the Judges of this court, that in his view, the Supreme Court must pronounce his opinion in this case erroneous also, and stated that it was, of course, his desire, as justice demanded a conformity to the doctrines of the Supreme Court, that a new trial should be awarded. The Judges of this court, after a very careful examination of the whole subject, concurred with Judge BARNES, and granted a new trial. The trial took place, and the law was laid down as the late President, and all of the present Judges of this court, supposed that *Harvey v. Turner* required that it should be laid down. The case was taken to the Supreme Court and reversed.

I proceed now to read to the jury the opinion on this branch of

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the case, of the Supreme Court, as pronounced by the chief justice: "The general rule certainly is, that for an omission to keep the principal regularly informed of the agent's transactions, and the state of the interest entrusted to him, the damages are to be proportioned to the actual loss. In *Harvey v. Turner*, however, on the authority of which the jury received the direction that is now the subject of error, it was ruled, and perhaps for the first time, that where the information transmitted is such as may induce the principal, in the adaptation of his operations to his means, to rely on an outstanding debt as a fund on which he may confidently draw, the agent makes the debt his own. Such is the naked principle of that case, and, as an exception, it is entirely consistent with the general rule asserted in *Elliott v. Walker*, which has been said to conflict with it. It is undoubtedly an exception; but an exception, which, resting on special circumstances, is as undoubtedly a reasonable and a wholesome one. In that case there was something more, however, than mere want of diligence in the transmission of information. There was negligence preceded by a positive act which had tended to beget a confidence not justified by the event, and which therefore called upon the agent the more imperiously to neglect no opportunity of removing the false impression which his act of commission had contributed to make. The money had been paid over or settled on account without the suggestion of a possibility of reclamation. The agent was the party who sought reimbursement; and it was held that his silence for nine months after he had charged himself with the debt in a rendered account current, had made it his own, the propriety of which it is difficult to doubt. To show by specific evidence a consequential derangement of the principal's plans, and the exact amount of the loss suffered from it, would require him to expose his whole business, in all its ramifications and minute details: and to sustain it before a foreign tribunal, with all the books and papers of the house properly authenticated or proved, would be intolerably inconvenient if not impracticable. His other business would, in the mean time, be left to regulate itself, and it would be found better, in the end, to have given up the claim, than to have pursued it under so many disadvantages. Nor would a jury be able to estimate, with any degree of precision, the loss incurred from a sacrifice of means in providing for sudden and unexpected responsibilities, and from a consequent relinquishment perhaps of profitable speculations. These are considerations which make it more politic and just that the delinquent factor should, in such circumstances, take the responsibility of the debt and the risk of collecting it, than that the wronged principal should be driven to define the exact amount of his loss by proofs so vexatious and oppressive. Such is the principle of *Harvey v. Turner*; and do the circumstances of the case at bar fall within it? In respect to Young's debt, there was nothing to indicate that it might be relied on as a

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productive source of ready money. Its existence was intimated by an ordinary account of sales, which however intimated not that it might be depended upon as peculiarly available; and there consequently was no positive act productive of the confidence which is supposed to have been disappointed by the event. So far as regards the transmission of information, therefore, the jury had to do with an ordinary case of negligence falling within the general rule; and consequently nothing of that sort called upon them to give damages beyond the amount of the loss shown to have been actually suffered." 6 *Wharton* 23.

Thus you have the general rule stated as it was originally stated in this court; and though *Harvey v. Turner* is said by the Chief Justice to be a reasonable exception to the general rule, yet it is also said to be an exception resting on special circumstances. These special circumstances were not relied on when the decision and its able illustration and argument were given to the profession and to the community for their guidance: and for all practical purposes, as an authority in the law in reference to other cases, *Harvey v. Turner* is probably to be deemed as overruled. I do not think I misapprehend the intention of the Supreme Court when I make this remark. However, the general rule I state to you in the words of the Chief Justice, speaking the authoritative language of the Supreme Court. But there is another portion of the opinion of the Chief Justice which it is proper to bring to your view. He says, "It may, however, become a grave subject of inquiry before another jury, whether the defendant's supineness in suffering the goods to remain with Young after his apparent default in respect to remitting the proceeds of the bales sold at auction, ought not to fix him for the whole. If it turn out that Young failed to do what under the circumstances he was bound to do, it will be the business of the judge to charge that it was the defendant's duty to take the residue of the goods out of his hands; and failing to do so, it could not be said that the actual extent of the damage suffered is less than the value of the goods lost by it."

And this brings us to the other ground—a want of proper diligence in defendant in conducting the business with Young. He knew of sales of part of the goods in October, at 4 months, coming due in February, 1823. Whether he also knew that sales took place in November is another question. Young stopped payment in July, 1823, and the money had been left in his hands during that time. The defendant, to weaken or destroy the force of this part of the plaintiff's case, has introduced as witnesses, Comly, Cabot, Snelling and Richards. With a view to show that there was nothing calculated to excite suspicion in Young's omission to remit the amount of the sales made in the fall of 1822, it was proposed by the defendant to show by these witnesses, that in consignments to commission merchants between the different cities of the United States and between Philadelphia and Boston, it is

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not, under ordinary circumstances, the practice to make or require partial remittances of occasional sales made before closing sales of the consignment. The defendant's counsel contended that, by the testimony, they have accomplished their purpose. The plaintiff denies this, and urges that the defendant is within the very exception put by the witnesses. I refer you to the precise language of the Chief Justice for my charge to you on this branch of the case, and leave the matters of fact for your own decision.

Again the plaintiff says, the defendant's case is defective because, by his omission to give notice, he deprives the plaintiff of all opportunity of exercising any control. What steps Brown might have taken it is too late now to say positively. Could he have learned something of Young? Would he not have directed the prompt collection from Young as credits expired? Would he not have given authority to compromise, and thus have received his portion of the \$600 offered to Arrott, even if nothing had been obtained before that time? The plaintiff says he has had no opportunity of acting on these points; that he is entitled to the benefit of them now, and that it is fair and reasonable to hold the defendant responsible as if the plaintiff had had the opportunity and had done all that is suggested. The jury will decide. I have thus noticed all the points, as far as the court ought to notice them, in reference to Young's debt.

As to Folwell's debt I have but little to say. The sale to Folwell was made in June 1822, at 6 months. Was he a proper person to make sale to upon credit? If not, the defendant is responsible. If he was, then on this point no responsibility arises. But if, in relation to this debt, the defendant has incurred responsibility, either by selling to an improper person, or by neglecting to give due notice of material facts: then, under the rule laid down by the Chief Justice, the damages to be awarded are to be in proportion to the damages actually sustained.

Another point has been made by the plaintiff for the consideration of the jury. He urges that his letter of the 21st of June 1824, required an answer, and that the omission to answer is an acquiescence in the plaintiff's claim therein made. Of itself, as a matter of law, it has not been urged that it is to be considered. It is, therefore, for the jury to say whether the conduct of Arrott did or did not show an actual acquiescence. All this is for the jury. The case is now with you."

The plaintiff excepted to the charge. The judge then said, that as he believed he had obeyed the instructions of the Supreme Court, he desired the exception or exceptions to be specified. The plaintiff replied that he wished the Supreme Court to review their opinion given in this case. This request of the judge, and the reply thereto, the plaintiff objected to having inserted in this bill of exceptions, but the defendant insisted on it, and the judge believing it to be proper to do so, inserted the matter in the bill.

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The judge then also said that a number of written points had been handed to him by the defendant, all of which he believed he had sufficiently answered in the general charge, to which remark the defendant assented. The plaintiff insisting upon having these points annexed to the bill of exceptions, although no exception had been taken by either party to the answers of the court thereto, the judge deemed it his duty to submit them to the judgment of the Supreme Court. If that court should hold that they ought to be a part of the bill of exceptions, then he returned them as a part thereof.

Errors assigned :

I. Because the judge refused to strike out the two portions, or either of them, of David Arrott's deposition, objected to by the plaintiff.

II. Because the judge received the evidence of Samuel Comly, giving the opinion of the witness upon the merits of this case, and other similar cases, and not in proof of any usage or custom of trade.

III. Because the judge received the testimonies of Cabot, Snelling and Richards, upon the same points.

IV. Because the judge erred and misdirected the jury—

1. In his explanation of the course of the decisions of the Supreme Court in this case and the other cases referred to.

2. In referring the testimony of Comly and others to the decision of the jury under the opinion given by C. J. GIBSON on a former occasion.

3. In leaving it to the jury to determine as a question of fact, whether the plaintiff was entitled to recover his proportion of the \$600.

4. In leaving the damages in reference to Folwell's debt to be determined as a question of fact by the jury.

5. In not instructing the jury that the defendant was liable for the whole amount of Folwell's debt, he having mixed it with his other funds and released Folwell without the knowledge of the plaintiff.

6. In leaving to the jury to determine whether the silence of the defendant, after the receipt of the plaintiff's letter of the 21st June 1824, and his omission to answer it, amounted to an acquiescence in its contents.

7. Because the judge should have directed the jury that under the circumstances the defendant could not recover back from the plaintiff what he had paid the plaintiff on account of the debt of either Young or Folwell.

This case was argued at March Term 1843, by *Randall*, for the plaintiff in error, and *M'Call* and *Cadwallader*, for the defendant in error; and was re-argued at this term by *Randall*, for the plaintiff in error, and *Cadwallader*, contra.

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The opinion of the Court was delivered by

KENNEDY, J. — The defendant having been the factor of the plaintiff, the latter seeks to charge the former in this action, among other things, with certain losses arising from sales made by the defendant or his sub-agent, of goods belonging to the plaintiff, which losses, as the plaintiff alleges, have accrued from the negligence and want of proper care on the part of the defendant. The counsel of the defendant, aware no doubt that it was the duty of their client, as the agent of the plaintiff, to show that he had kept him apprised of his doings, and that he had given him notice within a reasonable time of all such acts and circumstances as were important to his interest, lest by his neglect to do so he should be held liable to indemnify the plaintiff, offered to read in evidence the deposition of David Arrott, wherein, among other things, he testifies, “that the defendant gave this deponent particular instructions to see the plaintiff, and to inform him of the state of his consignment particularly, and the sales which had been made at Boston.” And again, “that he visited the plaintiff at Dundee, and made him particularly acquainted with the state of his consignment and of the sales made at Boston;” but in his cross-examination he says, “when the deponent was at Dundee, he had no copy of account sales from Young, (meaning the defendant’s sub-agent who made the sales at Boston), and of course showed none to the plaintiff.” The first two recited clauses of this deposition were objected to as not being admissible in evidence, but the court thinking otherwise, overruled the objection, to which the counsel for the plaintiff took a bill of exception, which is the ground of the first error assigned.

It certainly was the duty of the defendant at all times to keep the plaintiff, his principal, apprised of his doings, and to give him notice within a reasonable time of all such acts and circumstances as were important to his interest; and if by his neglect to do this the plaintiff has suffered a loss, he is entitled to be indemnified by the defendant. From the evidence in the case, it appears that the defendant, in the latter end of September 1822, forwarded a portion of the plaintiff’s goods consigned to him for sale, to James Young, of Boston, with instructions to sell the same there. That under the authority of the defendant, Young sold of the goods thus forwarded, in the following months of October and November, to the amount of about \$720 nett, on a credit of four months, which became payable in the months of February and March then next following. And again in the months of March, April and May 1823, Young sold the residue of the goods of the plaintiff for the additional sum of \$1167.70 nett, making in all, after defraying the charges and expenses attending the sales, the sum total of \$1887.70. David Arrott, the witness, as he states in his deposition, visited the plaintiff at Dundee, in Scotland, in the month of August or September 1823, and although sales had been made

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in the months of October and November 1822, of nearly one-half of the goods forwarded to Young at Boston, a good part of a year before that, and the monies arising therefrom received by Young at least as early as February and March 1823, it does not appear that any attempt was ever made by the defendant to advise or notify the plaintiff of the sales at Boston, or the receipt of the monies thereon, in any form or manner whatever, until the time that David Arrott says he visited the plaintiff in August or September of the latter year. The question then presents itself, if the defendant had not been in default and guilty of neglecting his duty before that, by not having communicated to the plaintiff the account of the sales and monies received thereon at Boston, by Young, was the communication testified to have been made in regard thereto by David Arrott, such a statement and notice of what had been done and transacted relative to the sales at Boston, and the monies received thereon, as the defendant was bound to give in order to acquit himself from the imputation of neglect of duty as the plaintiff's agent, which otherwise might be brought against him? We are of the opinion it was not. We think that it ought to have been in writing, and that it ought to have contained an account of the various sales made at different times, with their respective dates and the several sums of money received thereon by the sub-agent, as far as known to the defendant, or he had it in his power by reasonable diligence to inform himself. But this was not done even verbally, as would appear from the narrative of the witness; nor is it credible that he could have given the plaintiff a verbal account of the whole transaction in detail, as he had no written statement of it himself at Dundee, when he saw the plaintiff. We, therefore, consider that the court below erred in admitting those parts of the deposition of David Arrott to be read in evidence to the jury, which were objected to by the counsel for the plaintiff.

The second and third errors will be considered together, as they relate to the same point. They are exceptions to the opinion of the court in admitting the testimony of Samuel Comly, Joseph Cabot, Samuel Snelling and Benjamin W. Richards, which was offered and given for the purpose of showing in effect that the defendant was not to be regarded as being guilty of negligence in suffering Young, his sub-agent at Boston, to receive the monies received by him on the sales made by him of certain parts of the goods before the whole were sold, and to use the same for the space of three or four months without even requiring him to pay over or forward the monies so received, and without taking any steps to obtain payment thereof until Young became insolvent and unable to pay, because, as the counsel for the defendant alleged and offered to prove by the witness just named, it was not usual for factors or agents to transmit to their principals or employers monies received by them, as long as any part of the whole con-

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signment remained unsold, or if sold, as long as any portion of the monies to be paid thereon remained unpaid, when the honesty or ability of the agents or sub-agents were not questionable, and that such delay on the part of the latter to transmit the money actually received and coming to the employers, furnished no ground to suspect or believe that the money might be lost if suffered to remain until the sale of the whole quantity of the goods forwarded should be effected and the monies received thereon. Where the owner of the goods or the principal is advised from time to time by his agent of the sales as they are made, and again of the receipt of the monies as they are paid thereon, and according to the understanding that exists between them, arising either from a special agreement or a previous course of dealing between them, or the established usage or custom, if there be any, regulating the same, the principal or late owner of the goods is to call on his agent or factor and receive his money, or to draw upon him for it, the latter may retain it until it is demanded; but where the factor or agent is bound either by the agreement or previous course of dealing between them, or the usage of trade in regard thereto, to forward the money to his principal or employer, it is clearly his duty to do so, as he shall receive it, though it be only a part of what he expects, by the earliest opportunity, and no practice to the contrary will either justify or excuse his retaining it beyond such time, unless the sum shall be so small as not to justify the expense of forwarding it. Every principle of honesty and fair dealing would seem to require this of the factor or agent; and to allow him to indulge in doing otherwise, would inevitably, in many instances, prevent the principal or the employer from receiving his money forever: it would be placing the agent in a situation which might tempt him to use the money for his own purposes to the prejudice of his principal, which would be morally wrong and generally attended with injurious consequences to his principal. Besides, it is perfectly clear that if the agent uses the money, his interest is thereby immediately placed in direct opposition to that of his principal or employer, as to making sale of the residue of the goods; for as long as he has either occasion for the money received by him, or can use it to advantage, it becomes his interest to delay or put off the sale of the residue; or if he does sell, to sell on the longest possible credit, without regard to the interest of his employer or the owner of the goods, so that he may have the use of the money received by him during the interim. But it is well settled that no practice shall be sanctioned or in any way encouraged in an agent, that tends to place his own interest in direct opposition to the duty which he owes to his principal, because the temptation, perhaps, in many cases, would be too strong for resistance by men of flexible morals, and might ultimately lead to gross misconduct if not crime. The prohibition in this respect is positive, and has been found not only to be a salutary check against

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temptation and the practice of fraud, but to accord with sound policy and the purest principles of Christianity. And, indeed, the present case furnishes a striking illustration of the injurious consequences that seem too naturally to arise from such a practice as the witnesses were called to prove and spoke of in their testimony. Young, though a man of unblemished integrity and good credit in the estimation of his acquaintances, was tempted, under the indulgence of this practice, which the witnesses say is usually allowed to agents, to use the money received by him as agent for his own purpose; and where is it now? Lost forever. But had he forwarded it to the defendant as he received it, the plaintiff most probably would have received it without being compelled to sue for it. And here it may not be improper to consider the relation in which Young stood to the defendant. Young was his agent, as he was employed by him to act in his behalf without the knowledge or direction of the plaintiff. Young, therefore, became accountable to the defendant and not to the plaintiff, and bound to inform the defendant of all that he did under his commission within a reasonable time; and the defendant again, within the like time, was bound not only to acquaint the plaintiff with the same, but bound likewise not to suffer monies received by Young under his agency, to remain longer in his hands than was reasonable for its being forwarded or demanded, and if not forwarded or paid on demand being so made, then to use, without any unnecessary delay, the necessary means for enforcing payment. See *Cartwright v. Hateley*, (1 Vez. Jr. 292); *Pinto v. Santos*, (5 Taunt. 447); *Stephens v. Badcock*, (3 Barn. & Adol. 354). Seeing then that it was the duty of the defendant to have called on Young for payment of the monies received by him as often as he received the same, within a reasonable time thereafter, in the event of his failing to pay within such time of his own accord, and the money has been lost through the neglect of the defendant to call upon Young in the manner just mentioned for payment of it, the loss is fairly imputable to a failure on the part of the defendant to perform a duty which he was bound to the plaintiff to perform, and the plaintiff therefore entitled to claim indemnity from him. Under this view of this part of the case, we are satisfied that the testimony mentioned in the second and third errors ought not to have been received, and that the court erred in admitting it.

The fourth error is an exception to the charge given by the court to the jury. The first matter is the instruction given to the jury in relation to the loss of the money received by Young for the goods of the plaintiff sold by him, which arose from his appropriating the same to his own use, and becoming unable to make it good. It may be proper to premise that when the cause comes to be tried again, testimony mentioned in the second and third errors will be excluded, and, of course, what was said by the court to the jury in regard to it will and cannot be repeated, which will

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remove, in part, what is here excepted to. Before, however, we proceed to consider the instruction given to the jury in regard to the defendant's liability to make good this loss to the plaintiff, it will be proper to notice some of the other evidence given, which has a bearing on this part of the case, besides what has been already noticed in the discussion of the second and third errors. By a letter of the 22d October 1822, from Young, the defendant was advised of Young's having sold two bales of the plaintiff's goods, but without stating whether for cash or credit. By another letter, however, of the 13th November 1822, Young informed him that he had sold them on a credit of four months, and that he had made another attempt to sell the linens at auction, but the prices being unfavourable, he stopped the sale. He, to be sure, does not say expressly that any of the linens were then sold, but such fact might, perhaps, be inferred without going too far, or, if not inferred, it was sufficiently ambiguous to have put the defendant on inquiry in regard to it. And by his account of sales furnished afterwards in July 1823, it appears that he had sold on the 10th November, three days before his letter of the 13th of that month, \$498.22 worth, some portion of which, most probably, was Lumgair's goods, as in his account he seems to blend the goods of the latter with those of the plaintiff. It therefore appears that the defendant was apprised in October and November 1822 of Young's having made sales of the plaintiff's goods, the prices of which were to become payable in the months of February and March following; yet he neglects to call on Young for the money, as it appears, or to mention a remittance thereof until the 22d May 1823, some two and a half or three months nearly after it had become payable, when he writes to Young that he had been expecting an account of the sales of the linens as far as they had been made, accompanied with a remittance for the same. But the defendant, in his letter dated the 28th of the same month, only six days afterwards, writes to Young that he need not make a partial remittance, but to push the sales to a close, and then remit the whole at once. And what renders the conduct of the defendant the more extraordinary and the less excusable in having delayed a demand of the remittance of the money received so long, is the circumstance disclosed by the letter of Young to the defendant of the 6th March 1823, wherein he acknowledges his inability to pay a note given by himself and one Thompson to the defendant, for money lent, which was about to become payable in a few days, and begs the defendant to take it out of bank, where it had been deposited. It is difficult to imagine why this letter of the 6th of March did not wake the defendant up to a state of vigilance, and induce him to insist upon the immediate payment of all the monies received by Young as his agent, and if not paid instantler, to have gone further, and taken the goods still remaining unsold out of his hands, unless it was that he wished to have his own debt for the money lent paid

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first. But the plain consequence of this not having been done by the defendant, is, that the money then received, as also all the goods remaining unsold, have been lost to the plaintiff, so far as Young is concerned. And why should not the defendant indemnify the plaintiff for the whole amount of his goods sold by Young, seeing it was his duty to have proceeded as has just been suggested? And what rendered it still more imperatively the duty of the defendant to have done so, was, that the plaintiff at that time was pressing him to remit him all the monies he could obtain. The evidence, as it appears to me, shows not only an entire want of vigilance on the part of the defendant to secure the payment of the money received by Young, and the goods in his hands from being lost to the plaintiff, but a degree of negligence also that is unaccountable, as well as culpable, in not even advising the plaintiff by writing that he had forwarded any portion of his goods to Boston and placed them in the hands of Young, there to be sold for his benefit, until some nineteen or twenty months afterwards, when Young had sold the goods and appropriated the proceeds to his own use something like eleven months previously, and become insolvent at least nine months. Thus all information was withheld by the defendant from the plaintiff in regard to these goods, so that the latter had it at no time in his power to give any advice to the defendant as to what he had better do in order to secure the goods or the monies arising therefrom in the hands of Young from being lost. That it was the duty of the defendant to have advised the plaintiff of his having sent the goods in question to Boston, within a reasonable time at least thereafter, cannot be denied, as also to have notified him from time to time of the sales made thereof and the monies received thereon by Young, so that the plaintiff might have been enabled to judge for himself, and to have directed the defendant what to do under the existing circumstances as they occurred, in order to guard against any loss or detriment that might otherwise occur. The defendant, however, having neglected everything of the sort, is it not reasonable and just that he should be held responsible for any loss that has happened, which possibly might have been avoided had he only performed his duty to the plaintiff as his agent? It appears to be contrary to every principle of natural justice, as well as sound policy, to say that he ought or would not be answerable for such loss. Indeed, it seems to me, that it would not be going too far to hold, under the circumstances of this case, that the defendant by his conduct had impliedly agreed to be answerable to the plaintiff for any loss that should arise from the default of Young. But the evidence, besides showing most incontestably the neglect of the defendant to perform his duty, tends also strongly to prove that if he had used ordinary diligence in the performance of it, the loss which has arisen immediately from the infidelity and insolvency of Young, in all probability, would not have accrued. And if any

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doubt existed whether the actual loss sustained by the plaintiff was equal to the value or price of the goods or not, it being proven that a breach of duty had been committed on the part of the defendant, tending to produce the loss, it lay on him to remove the doubt by giving testimony showing what the amount of the actual loss was. The court below, however, seem, as it appears to me, to have instructed the jury differently, by holding out the idea to them that it rested with the plaintiff to show the amount of the actual loss. If the court intended to impress the jury with this notion, we are of opinion that it erred. For it is evident, if such a rule were to be applied to the plaintiff in cases like the present, he would go without redress, in many instances, where his agent by his negligence has caused a loss equal to the value of the property committed to his care. While the property is in the possession and care of the agent, he must be supposed to be cognizant of all that happened to it, and of the actual loss which his want of due care and diligence may have occasioned to his principal, whereas the principal may well be presumed to know but little, if anything about it, and hence it is nothing more than reasonable that the burthen of proof, as to the amount of the actual loss sustained by the plaintiff, should lie upon the defendant in such cases. This accords with what is advanced by Mr Justice ROGERS in *Beckman v. Shouse*, (5 *Raple* 189, 190); and by Chief Justice SAVAGE in *Beardslee v. Richardson*, (11 *Wend.* 25). But in this case the evidence established the delinquency of Young beyond all question, in his converting the monies arising from the sale of the plaintiff's goods to his own use; and likewise a total neglect of duty, on the part of the defendant, in not demanding the monies as received by Young, and in not taking the goods then unsold out of his possession, when he discovered that he was unable to meet his pecuniary engagements, and especially if Young had failed, on demand, to pay the money immediately which he had previously received. The court, therefore, ought to have told the jury, in plain terms, that the defendant had rendered himself liable to the plaintiff for the full value of the goods placed in the hands of Young, or at least for the amount of money produced by the sales made of them. This direction would have been in conformity also to the opinion of this court as expressed by the chief justice on a former writ of error in this case. 6 *Whart.* 24. It does not, however, appear to have been given, but it seems to have been submitted by the court to the jury to decide the question of damages, without laying down any rule as a measure for them to go by, other than in general terms that they ought to be equal to the actual loss.

The only remaining matter intended to be noticed is the Folwell debt, amounting to \$283.50, created by a sale made by the defendant of a portion of the plaintiff's goods to John Folwell in the latter end of June 1822, on a credit of six months. To secure

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the payment of this debt the defendant took a note of Folwell, payable to himself, including in it a debt of \$138.84 owing to himself on his own account. It is not deemed material to consider whether the credit of Folwell was such as to make it prudent to sell to him on a credit of six months. One witness says it was *pretty* good; that it was such as induced the witness to sell to him, by which he lost; and another witness testifies, that his standing was equal to any of the jobbing or piece-men—was about the first in the market; but whether it was usual to sell to such men on a credit of six months, does not appear. What the credit of Folwell was among business men at the time the defendant sold to him, is considered unimportant, because we are of opinion that he made the debt his own by blending it with his own debt, and afterwards releasing Folwell from the payment of it as his own, without any authority from the plaintiff to do so. Having thus made the debt his own, he became and remains liable to the plaintiff for payment of the amount of it with interest thereon. This case may be considered not unlike the case of an agent (only stronger, as the defendant here released the debt) who improperly, and contrary to his known duty or the habits of business, deposits the money of his principal in his own name, with a banker who fails; the agent, in such case, becomes responsible to his principal for the money lost by the failure. *Massey v. Banner*, (1 Jac. & Walk. 245-8); 4 Madd. 413; *Story on Agency* 188, pl. 200. Because, as was said in *Wren v. Kirton*, (11 Vez. 382), he cannot so deal with his principal's money as that if the banker's solvency continue he may be in a condition to treat it as his own, and if insolvency happen, he may escape by considering it as belonging to his principal. *Paley on Agency* 45, (2d Amer. edit. 1822). This reasoning is directly applicable to the defendant in this case, who, having taken the note in his own name of Folwell, including money coming to himself on his own account, had it in his power, as long as Folwell continued solvent, to treat the whole of it as his own; but Folwell having become insolvent without paying the note, the defendant wishes to escape from the loss by showing that the note was taken to secure money coming to the plaintiff, as well as himself. The authority cited, however, would seem to be opposed to his doing so. But without deciding the point on this ground alone, we think that the additional circumstance of the defendant's having released Folwell from the debt upon a composition made with him, without any authority from the plaintiff, renders him liable to the plaintiff for the amount of it.

Judgment reversed, and a *venire facias de novo* awarded.

Winder against Smith.*

J. S. and G. S. brought an action against W. F. K., L. K. and W. H. W., and obtained judgment therein, and on the 21st May 1841, issued a *pluries capias ad satisfaciendum* thereon, upon which W. H. W. was arrested, and gave bond to take the benefit of the insolvent laws, and was thereupon discharged from custody. At the time of his arrest W. H. W. was possessed of considerable personal property, had more money on deposit in bank than would have paid the amount of the execution, and was the owner of a large real estate. He forfeited his bond, and an action of debt was brought against him and his surety upon it, to which he pleaded that by reason of the possession and ownership of the real and personal above mentioned, the arrest amounted to duress and the bond was void. *Held*, that since the Act of 16th June 1836, exemption from arrest is a privilege, and that submitting to it and giving bond is a waiver of the privilege.

ERROR to the District Court for the city and county of *Philadelphia*, in which J. and K. Smith brought an action of debt against Winder and M'Lanahan, and declared as follows:

"William H. Winder and Johnston M'Lanahan were summoned to answer John K. Smith and George K. Smith, of a plea that they render unto them the sum of \$2500, which to them they owe and from them unjustly detain.

And thereupon the plaintiffs, by their attorney, complain for that whereas the said defendants heretofore, to wit, on the 21st day of May 1841, at the county aforesaid, in and by their certain writing obligatory sealed with their seals and now shown to the court here, the date whereof is the day and year aforesaid, did acknowledge themselves to be held and firmly bound unto the said plaintiffs in the said sum of \$2500, above demanded, to be paid to the said plaintiffs, their executors, administrators or assigns; to which payment well and truly to be made, they, the said defendants, did bind themselves, their heirs, executors and administrators, jointly and severally, which said writing obligatory was and is subject to a certain condition thereunder written, to the effect following, to wit: that the said William H. Winder had been arrested on a *ca. sa.* issued by the District Court for the city and county of Philadelphia, at the suit of the said plaintiffs, for the sum of \$1052.62, with interest from March 1st 1839, beside costs, and who had made application to the prothonotary of the Court of Common Pleas of the city and county of Philadelphia, to give bond with sufficient security to comply with the provisions of the Act of the General Assembly of the Commonwealth of Pennsylvania, passed the 16th day of June 1836, entitled "an Act relating to insolvent debtors," and as security for whom the said pro-

* We are indebted to E. D. Ingraham, Esq. for the report of this case.—REPS.

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thonotary had approved of the said Johnston M'Lanahan, that if the said William H. Winder should appear at the term of the Court of Common Pleas for the said county then next ensuing, and then and there present his petition for the benefit of the insolvent laws of this commonwealth, and comply with all the requisitions of the said law, and abide all the orders of the said court in that behalf, or in default thereof, and if he should fail in obtaining his discharge as an insolvent debtor, that he should surrender himself to the gaol of the said county, then the said obligation should be void, otherwise to be and remain in full force and virtue.

Yet, notwithstanding, the said William H. Winder did not appear at the said term as aforesaid, and then and there present his petition for the benefit of the insolvent laws of this commonwealth, and comply with all the requisitions of the said law, and abide the orders of the said court in that behalf, or being in default thereof, and having failed in obtaining his discharge as an insolvent debtor, he did not surrender himself to the gaol of the said county, whereby an action hath accrued to the said plaintiffs to demand and have of and from the said defendants the said sum of \$2500 in form aforesaid, acknowledged and above demanded. Yet the defendants (although often requested so to do) have not as yet paid the said sum of \$2500 above demanded, or any part thereof, to the said plaintiffs, but to do this have hitherto wholly neglected and refused, and still do neglect and refuse."

To this declaration the defendants pleaded *non est factum*, and the following special plea:

"And the said defendants, for a further plea in this behalf, by leave of the court first had and obtained, according to the form of the statute in such case made and provided, say that the said plaintiffs ought not to have or maintain their aforesaid action thereof against them, because they say that the said plaintiffs on the 30th day of June 1837, and before the making of the said writing obligatory, impleaded one William F. Krumbhaar, one Lewis Krumbhaar, and the said William H. Winder, in an action of debt in this honourable court, to the term of June in the year last aforesaid, number 1021, and the same was so proceeded in that on the 16th day of September, in the year last aforesaid, the said plaintiffs, by the consideration of the same court, recovered against the said William F. Krumbhaar, Lewis Krumbhaar and William H. Winder, as well a certain debt of \$1800, lawful money of the United States of America, as also \$10.25, which to the said plaintiffs were adjudged for their damages which they sustained, as well by occasion of the detention of that debt as for their costs and charges by them about their suit in that behalf expended, as in and by the record thereof remaining in the same court will more fully and at large appear. And the said defendants further say, that on the 18th day of May 1841, and on the

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21st of May in the year last aforesaid, and for a long time before and after and at the time of the arrest of the said William H. Winder upon the *pluries capias ad satisfaciendum* hereinafter mentioned, the said William H. Winder was the owner in fee simple of a three story brick house and lot of ground thereunto belonging, situate on the south side of Arch street, near Schuylkill Sixth street, in the city of Philadelphia, of the value of \$10,000, subject to a mortgage of \$5000; and also owned 156 barrels of beef, worth \$1162, 22 barrels of pork, worth \$220, in his the said Winder's store, number 37 South Wharves, in said city, 10 shares in the Washington Insurance Company in the said city, worth \$150, and a mortgage duly recorded for \$1000, on a lot and houses at the corner of Cohocson creek and Third street, in the county of Philadelphia, and also 550 barrels of beef, worth \$3850, in the city of New York, and also owned and had upon deposit in the Girard Bank in the city of Philadelphia, the sum of \$2000, lawful money aforesaid, of which said last-mentioned ownership and property real and personal, the said plaintiffs and the said sheriff then and there had notice. And the said defendants further say, that the said plaintiffs on the said 18th day of May, in the year last aforesaid, caused to be issued upon the said judgment so as aforesaid recovered, a certain writ of the commonwealth of Pennsylvania, commonly called a writ of *pluries capias ad satisfaciendum*, directed to the sheriff of Philadelphia county, whereby the said sheriff was commanded that he should take the said William F. Krumbhaar, Lewis Krumbharr, and William H. Winder, if they should be found in his bailiwick, and them safely keep so that he should have their bodies before the Judges at Philadelphia, at the District Court for the city and county of Philadelphia, there to be held the first Monday of June then next ensuing, to satisfy the said plaintiffs the said debt of \$1800, so as aforesaid recovered, as also the said \$10.25 so as aforesaid adjudged to them for their damages, costs and charges. And the said defendants further say, that the said sheriff on the 21st day of May in the year last aforesaid, did unlawfully take the said William H. Winder by his body upon the said last-mentioned writ, and illegally imprisoned him for the space of four hours, whereupon the said William H. Winder and Johnston M'Lanahan, to procure the release and discharge of the said William H. Winder from said illegal imprisonment, and through the duress thereof, did make and execute the said writing obligatory to the said plaintiffs: by means of which said several premises and of the Act of the General Assembly of the Commonwealth of Pennsylvania, in such case made and provided, the said writing obligatory in the said declaration mentioned is utterly void: and this the said defendants are ready to verify, wherefore they pray judgment, if the said plaintiffs ought to have or maintain their aforesaid action thereof against them, &c."

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The plaintiffs took issue on the first plea, and demurred generally to the second, and the defendants joined in demurrer.

Upon the argument of the demurrer the court below gave judgment for the plaintiffs—which was now assigned for error.

Ingraham and Meredith, for the plaintiffs in error.

By the 28th section of the Act of 16th June 1836, entitled, “an Act relating to executions,” (*Purd.* 414, 415, 6 *Ed.*), it is provided that “no writ of *capias ad satisfaciendum* shall in any case be executed, where the defendant has real or personal estate sufficient to satisfy the judgment; and if the defendant shall not have sufficient fully to satisfy the judgment and costs of execution, then such writ may be executed for the deficiency.” Now what is prohibited by the Act of Assembly is unlawful. No court will carry it into effect. An action will lie against the party infringing the law, and all acts in pursuance of the infraction of such a law are void. An indictment will lie for such violation. *Berry v. Hamill*, (12 *Serg. & Rawle* 210), and the cases cited. The execution of this writ was directly in the teeth of the Act of Assembly. The plaintiff knew of the defendant’s ability to pay, and would not give him the chance of showing property, for he issued no *fiery facias* with the *pluries capias ad satisfaciendum*. *Allison v. Rheam*, (3 *Serg. & Rawle* 141). The grievance under the former Act of Assembly was the execution of the writ as it is now. *Berry v. Hamill*. The act of arrest was void; trespass would lie for it, and how could it be cured by the bond? 6 *Mass.* 506; 15 *Johns.* 256. What makes the bond procured by this unlawful arrest good? Does the law allow, by this circuitry, the making good of such an arrest? These bonds are not voluntary bonds. 5 *Watts* 346. Even where the arrest is lawful, they must be exactly of the character that the law which authorizes them to be given prescribes, or they are void. *Ibid.* And this is a suit on one of them to carry it into effect as an insolvent bond; so that the argument must be, that a good arrest must be defeated if the bond be irregular, but a void arrest may be rendered good and available to the plaintiff, if the bond be regularly drawn.

It is therefore considered by the law as given under duress, if it be required in a form different from that the law requires; and though the obligor get the benefit of it, it is not good as a voluntary bond at common law. 13 *Serg. & Rawle* 190; 14 *Serg. & Rawle* 380, and the cases cited. See 10 *Serg. & Rawle* 325. *Egbert v. Darr*, (3 *Watts & Serg.* 517), was the case of lawful imprisonment and estoppel by the fraud of defendant. So the imprisonment was lawful, and the bond was to the plaintiff—was voluntary and good, in 16 *Serg. & Rawle* 307. It was not pretended to be a statutory bond. The proceeding was right in 5 *Mass.* 316. So 7 *Mass.* 98. The question in 12 *Serg. & Rawle* 106, was whether a discharge

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obtained by fraud was an answer to the bond. Nay, if a bond be given in a proceeding in which it is unlawful to ask or to give it, as by a criminal who is not the subject of it, and the obligor get all the benefit of it, the party who took it, knowing he ought not to have taken, derives no benefit from it. He cannot aver it to be voluntary; 3 *Watts* 384; where that was the argument. The arrest was lawful in 2 *Miles* 166. The defendant declined to assert a privilege intended for his benefit, which he might do, 16 *Serg. & Rawle* 50, and that waived, he was the proper subject for a continued arrest, discharged lawfully by a bond under the statute.

Williams and *Miles* for the defendants in error. In this case there is nothing to show that the Krumbhaars were not liable to arrest on a *ca. sa*; and, if they were liable, Winder had no privilege, for having joined himself with persons not privileged, he thereby lost his own privilege. 2 *P. A. Bro.* 135; 2 *Johns.* 252; 5 *Bac. Ab.* 619; 2 *Vern.* 246; 2 *Roll. Ab.* 274; 1 *Ventr.* 298; *Stran.* 610; *Dyer* 377. Now this exemption from arrest under the Act of 16 June 1836, is clearly a privilege. This writ was not a void writ, but it was not to be executed because of the party's privilege as to his person, similar to that of a freeholder, who loses his if he is joined with a person liable to arrest. 2 *P. A. Bro.* 135. It is clear, too, that a *fi. fa.* and *ca. sa.* could not have both been executed at the same time against all the defendants, nor one writ against two of the defendants and one against the other. The Krumbhaars, if arrested, could not have pleaded that Winder had property, nor could Winder relieve them from arrest on that account. The writ therefore, if regular against them, as it was, would of course be good against all the defendants. The Acts of 1724-5, and of April 13 1807 (4 *Sm. Laws* 477) contain provisions more positive than the Act of 1836, yet both a *fi. fa.* and *ca. sa.*, it has always been held, might issue, and the defendant elect which should stand. 2 *Binn.* 230; 3 *Binn.* 404. This writ is not void, *Allison v. Rheam*, (3 *Serg. & Rawle* 142); 8 *Mod. Rep.* 280; *Berry v. Hamill* (12 *Serg. & Rawle* 210), and by giving bond the defendant submitted to it, and waived his privilege, and cannot raise this question in a collateral manner, as he attempts to do here. 13 *Serg. & Rawle* 199; *S. C.* 1 *Watts*, 135. The course should have been to set aside the writ, by application to the court out of which it issued, as was done in *Allison v. Rheam*, and *Berry v. Hamill*, according to the statement in 4 *Whart.* 343. As to the ground taken, that there was duress,—for the whole plea amounts to that,—it cannot be sustained, for to constitute duress the restraint must be unlawful; and even if there existed duress, the surety in the bond, M'Lanahan, could not plead it. *Cro. Jac.* 187; *Hurlstone on Bonds*, 139; 15 *Johns* 256.

The opinion of the Court was delivered by

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GIBSON, C. J.—There is one view of this case which relieves us from considering it in any other. There can be no duress from mere imprisonment when it is lawful; and an arrest like the present was held to be unlawful in *Allison v. Rheam*, only because the *capias ad satisfaciendum* was prohibited under the circumstances, and consequently void. On that ground and no other was the defendant held liable in an action of trespass for false imprisonment. The statute now in force, or that which was in force at the time of the arrest now in question, does not prohibit the *capias* in the first instance; and an arrest under it, where there is property to the value, is only voidable at the election of the debtor. It is very true that such an arrest persisted in against the remonstrance of the debtor, might make the creditor a trespasser; but nothing like remonstrance is averred in the plea. The statute enacts that a *capias ad satisfaciendum* and a *fieri facias* may be sued out together; but that the former may not be executed where the defendant has property in the county to answer the debt and costs. The conditional exemption of the debtor's person, like every personal privilege, may be waived; and it is virtually waived when the debtor allows himself to be arrested without objection, and without pointing out his property as the legitimate source of satisfaction. As a matter applicable to the interpretation of the present statute, we dissent from the *dictum* of Mr. Justice DUNCAN in *Berry v. Hamill*, that it is the business of the creditor to inform himself of the debtor's property, and that he acts in respect to it at his peril. True, it was decided in *Allison v. Rheam* that the existence of property to the value *ipso facto* made the *capias* void; but it was held that the creditor might call on the debtor for the proper information; and it is not to be doubted that if the latter had refused to give it, he would have been estopped from showing the truth of the case afterwards, in order to make the creditor a trespasser. Thus the *capias* would have been sustained notwithstanding the prohibition; and thus, according to *Allison v. Rheam*, the law would have been held under the late statute. Its successor makes the legality of the arrest depend, not on the validity of the writ, but on the propriety of its application. It sanctions the practice, prevalent under its predecessor, of suing out a *capias* and a *fieri facias* together; and, not declaring the writ to be unlawful in the first instance, it admits of a more liberal construction. Now the object to be attained was not to entrap the creditor or beset his path with perils, but to exempt the debtor's person from execution where satisfaction could be had from his property; and as the latter was to be the price of the former, it was necessarily made his business to tender it. By not claiming his privilege he waived it; and had he not waived it, he would have been bound to disclose the foundation of his title to it. A debtor is bound to disclose his property in order to exempt his person from arrest under the insolvent law, and why

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not disclose it to exempt his person from arrest under the execution law? Certain it is that it was not the purpose of the statute to put him in an attitude of defiance, and prompt him to say—"It is not my business to put you on the scent of my property: find it out as you may; but remember you act at your peril, and touch me if you dare." The law is not so unreasonable as to require that the creditor take notice of matters so peculiarly in the debtor's knowledge. It is true the plea contains an averment of notice; but notice of property without a claim of privilege on the foot of it, is not enough. The debtor may elect to waive his privilege and subject his person; and when he elects to have an execution levied on his property, it is his duty to give notice, not of the existence and whereabouts of his property merely, but of his election also. Such an election is not to be presumed as an inference of law, for an arrest on final process is not always shunned. It has sometimes been embraced by a debtor as the lesser evil; and imprisonment has been endured for a lifetime rather than part with an estate in payment of debts. It is sometimes not even an adversary proceeding in anything but form, for there have been numerous instances of an arrest by a friend to put the party in the way of getting the benefit of the insolvent laws. A debtor may submit to it, choosing to surrender his property for general distribution rather than suffer the creditor to gain a preference by his execution; and when he says nothing about property or privilege, what is the officer to think? It might perhaps be successfully contended that even his silence would amount to an election at the time. But whatever may have been the validity of the arrest at the instant, it certainly admitted of confirmation, and the debtor as certainly confirmed it when he used it as the foundation of a right. His application to be set at liberty, giving bond to appear and petition at the return of the writ, was founded on the assumption of a lawful arrest. The statute describes him who is competent to make it, as a debtor "arrested, detained or held by virtue (not colour) of any process or bail-piece;" and it is a condition of the bond that he return to imprisonment failing to obtain his discharge—which would scarce have been said of an imprisonment false and unlawful. At least the condition shows that the proceeding was not intended to be a remedy for an unlawful arrest. Now if an exempt choose to waive his privilege, submit to an arrest, and proceed by petition to a judge, instead of a *habeas corpus*, he cannot afterwards refuse to be bound by his election. He may not resort to inconsistent remedies, assuming that the imprisonment is unlawful for one purpose and lawful for another; and this for the same reason that a landlord cannot proceed for use and occupation against a tenant whom he has dispossessed as a trespasser, or that a tenant cannot insist on notice, having denied his landlord's title. It is a fundamental principle of the law of election, that a man shall not affirm one part of an act and

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disaffirm another, or treat it as both lawful and injurious. By giving bond, the debtor took a position from which it is too late to recede. He admitted the imprisonment to be lawful; and where that is the case, duress from it is out of the question. It is said that if a man lawfully in prison make an obligation against his will, he may avoid it. *Roll. Abr.* 687. Doubtless he may, where there has been duress by other means of compulsion than the confinement. Where a plaintiff in a judgment which was recovered without a legal cause of action, had the defendant arrested under threats of imprisonment till he should perish if he would not execute a release, this was held not to be duress, but the exercise of a right by due course of law. 1 *Lev.* 69. It appears by the plea that the bond before us was given at the debtor's own instance, and as his voluntary act. Whether he had originally forfeited his privilege by joining with unprivileged contractors, it is unnecessary to determine, as he certainly renounced it when he consented to be arrested and recognised the lawfulness of his imprisonment.

Judgment affirmed.

Hauberger *against* Root.

Declarations or admissions of one of several devisees or legatees named in a supposed will, tending to prove that the alleged testator was not of sufficiently sound mind at the time to make it, or being very weak in mind was improperly influenced to make it contrary to what he would otherwise have done, are not admissible on the trial of a feigned issue directed by the Register's Court to try its validity.

Whether made before or after the will, or by one who was a party to the feigned issue, where they may affect others not in privity with him, is not material.

Nor is evidence admissible on such issue to prove that the testator some fourteen years before furnished a son with money to buy a farm, so that he would receive more than his share.

An account or book in writing signed by the testator and referred to in the will, is evidence on the issue of *devisavit vel non*, though it was copied from a paper which was destroyed.

Evidence is admissible to show that the holder of a bond of the testator's produced it at the appraisement of the testator's effects, and had it inserted in the inventory, and said it had been given to him for collection, to rebut an imputation on his honesty in relation to the bond, which a witness on the other side had testified as proceeding from the testator.

ERROR to the Common Pleas of Chester county.

This was a feigned issue, in which David M. Root and Jacob M. Root were plaintiffs, and John Hauberger, Samuel Hauberger,

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Jacob S. Root and Christopher Hitner defendants, directed by the Register's Court of Chester county to try the validity of a certain paper writing purporting to be the last will and testament of Jacob Root, deceased, and bearing date the 1st May 1841. The precept issued by the Register's Court was in the form prescribed by the Act of 15th March 1832, and after setting out the preliminary facts, proceeded thus:

"And whereas Mr Lewis, of counsel as aforesaid, prayed that a feigned issue might be directed into our said Court of Common Pleas, wherein the said David M. Root and Jacob M. Root should be named as plaintiffs, and John Hauberger, Samuel Hauberger, Jacob S. Root and Christopher Hitner be named defendants, to try the validity of said instrument of writing and the matters of fact objected thereto, to wit; that the decedent by reason of the imbecility and feebleness of his intellect at the time of the making of the said writing, was incapable of making a valid testament or doing any other legal act. That the said writing was procured by the fraudulent influence of some of the principal devisees and legatees named in the same, exerted upon the enfeebled intellect of the said decedent; and also any other matters of fact that may be objected thereto. Therefore we command you," &c.

The issue framed was in the common form of issues of *devisavit vel non*.

On the trial a great number of witnesses were examined at much length, but as the case came before this court merely on bills of exception to evidence, it is unnecessary to state the circumstances. The defendants examined one Wells to prove a conversation with the testator in respect to a bond on which he went to pay the interest, on which occasion the testator sent him for Jacob M. Root, who, on being called by witness, suggested that it would be necessary to bring pen and ink along, as there were none in the house. Witness remarked to him, on the way to the house, it was highly necessary for him or his father, or some one, to attend to the old man's business, for he was not fit to attend to his own.

1. The defendants then proposed the following question to the witness: "Did Jacob M. Root say anything in answer, and, if so, what?" The plaintiffs objected to any answer by the witness to this question: the court sustained the objection and sealed an exception.

2. On their examination of Adam Spang, the defendants requested the witness to state whether Jacob Root furnished his son John with money to buy a farm fourteen or fifteen years previous. The plaintiffs objected to this question; the court overruled it and the defendants excepted.

3. The defendants proposed to another witness the following question: "What did you hear John Root say a day or two after the death of the old man, about the existence of a will of Jacob

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Root?" The plaintiffs objected to this question; the court sustained their objection and sealed an exception.

4. The defendants asked a witness this question: "After the 1st May 1840, did you hear John Root say anything about the state of the old man's mind, and, if so, what?" The plaintiffs objected; the question was overruled and a bill sealed.

5. The plaintiffs offered in evidence a book of entries which a witness testified he had copied, at the instance of the testator, from an old pamphlet in the testator's handwriting. The entries, which were signed by the testator, were of monies paid to three sons-in-law. The defendants objected to its admission, but the court admitted it and sealed an exception.

6. The plaintiffs asked a witness, who had stated that David M. Root had in his possession a note belonging to the testator, how David said, at the time he produced the note, he came to have possession of it. The defendants objected, but the court overruled the objection and sealed a bill.

The testator, by his will, after the usual introductory clause and ordering his personal estate to be sold for the payment of his debts, devised as follows:

3. It is my will, and I do order that my real estate, containing 300 acres, more or less, situated in Coventry township, Chester county, be divided into two shares, and disposed of in the following manner, viz., that part of my real estate lying south, &c., with the appurtenances, &c., I give and bequeath unto the children of my deceased son, Jacob Root, their heirs and assigns for ever, to be divided in equal shares between them, in such a way as they or their representatives can agree among themselves, which said lands shall be in full for their share of my estate. That part of my real estate lying north, &c., and the part south, &c., not included in the bequest above-mentioned, I give and bequeath unto my son John Root, his heirs and assigns for ever, as his full legacy, subject, nevertheless, to the payment by son John Root of \$200 (without interest) to each of the children of my deceased daughter Susan, upon their becoming of age, which said sums, when paid, to be in full of their share of my estate.

4. It is my will, and I do order that all my bonds, notes, book-accounts and proceeds of my personal goods, be collected as soon as circumstances will admit of, and be divided in three equal shares: one equal third part to be paid to the children, or their representatives, of my son John Root; two equal third parts to be paid to such person or persons as my executors shall appoint in trust, and to be by him or them put upon interest, and the interest of which to be paid half yearly to my daughter Catharine, intermarried with John Albright, and my daughter Elizabeth, intermarried with John Hauberger, for their sole and separate use during their natural lives, exclusive of the said husbands, and for which their, the said Catharine and Elizabeth's, receipt alone for

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their respective parts, shall be a sufficient discharge; and from and after the decease of the said Catharine or Elizabeth, their respective share shall be equally divided among their respective children, share and share alike.

It is further my will, that the sum of \$900, paid by me to each of my sons-in-law, John Albright, John Hauberger and Daniel Hauberger, and charged to them in my books, shall be their legacy in full out of my estate.

Lastly—I nominate, constitute and appoint my grandsons, David M. Root and Jacob M. Root, to be my executors, &c.

The errors assigned were in overruling the questions in the first four bills, and in admitting the evidence in the two last bills of exception.

This case was argued at March Term 1843, by *Mulvany* and *Lewis*, for the plaintiffs in error, and *Hemphill* and *Dillingham*, contra; and was now re-argued by *Lewis* and *Meredith*, for the plaintiffs in error, and *Hemphill* and *Dillingham*, contra.

The opinion of the Court was delivered by

KENNEDY, J.—The first, third and fourth errors raise the question whether the declarations or admissions of one of several devisees or legatees named in a supposed will, tending to prove that the alleged testator was not of sufficiently sound mind at the time to make it, or being very weak in mind was improperly influenced to make it contrary to what he would otherwise have done, be admissible or not on the trial of a feigned issue directed by the Register's Court to determine its validity. They will therefore be considered together as one error.

The declarations mentioned in the first bill of exceptions, and offered to be given in evidence by the defendants in the court below, were alleged to have been made by Jacob M. Root, one of the devisees in the will, and also one of the plaintiffs to the issue then trying, a few days before the making of the will. But whether made before or after is not deemed material. Neither is it considered of any importance that they were made by one of the devisees named in the will, who appeared to be one of the plaintiffs on the record. Having come to the conclusion that the declarations of such devisee were not admissible for the purpose for which they were offered on the trial of the issue *devisavit vel non*, because the verdict and judgment founded on the credit and effect of them, if received in evidence, would go to affect the rights of the other devisees or legatees named in the will, whose interests under it are altogether distinct and separate from those of the party making such declarations, renders it unnecessary to notice particularly the declarations or admissions referred to in the third and fourth errors assigned, as it is self-evident, if those

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embraced by the first error be shown to be inadmissible, that those of the third and fourth must be so also.

Though it be true that the admissions of a party to the record are generally receivable in evidence against him, yet where there are several parties on the same side, the admissions of one are not permitted to affect the others, who may happen to be joined with him, unless there is some *joint* interest or *privity* in design between them. *Dietrich v. Dietrich*, (4 Watts 167); *Commonwealth v. Ebberle*, (3 Serg. & Rawle 9); *Dan v. Brown*, (4 Cow. 483, 92); *Rex v. Hardwick*, (11 East 578, 89), per LE BLANC, J.; *Bland v. Haslerig*, (2 Vent. 151); *Whitcomb v. Whiting*, (Doug. 652); *Greenl. Ev.* 206, pl. 174. Hence where no common object or motive is imputed, as in actions for negligence, the declarations or admissions of one defendant are not admitted against any but himself. *Daniels v. Potter*, (1 Moo. & Malk. 501). So upon a like principle it is very apparent, where they cannot be admitted against himself without affecting the rights of others who may or may not happen to be parties on the record, that such declarations or admissions ought not to be admitted at all, not even against the party himself making them, notwithstanding he is a party to the record. For nothing could be more unjust than that their rights or interests should be affected by the declarations or admissions, or placed at the disposal of one with whom they have no connection or concern whatever. This principle, as it appears to me, is fully established by a series of our own decisions on the subject, in a manner that ought not now to be questioned, and certainly cannot be disregarded without overturning them. The first I refer to is in the case of *Gallagher v. Rogers*, (1 Yeates 390), where land having been devised by A to his widow for life, remainder to B, evidence of declarations by the widow that the will was made by her undue influence and imposition practised on the testator, was ruled to be inadmissible in an action brought after her death by the remainder man to recover the land. It is true that the court seem to have thought that the evidence might have been admitted against the widow in a suit brought by her, but it cannot be supposed for a moment that the court would have thought so in a case where the admission of it would have tended necessarily to affect the rights of the remainder man as well as those of the widow. In *Lightner v. Wike*, (4 Serg. & Rawle 203), the declarations of a person named as executor and devisee in the will, were held to be inadmissible as evidence in an action in which the validity of the will was in question, in which he was not a party and would have been a competent witness. And in *Bovard v. Wallace*, (4 Serg. & Rawle 499), and *Nussear v. Arnold*, (13 Serg. & Rawle 323), it was adjudged by this court that the declarations of one of several devisees were inadmissible to invalidate the will upon an issue *devisavit vel non*. And again in *Dietrich v. Dietrich*, (4 Watts 167), in note, it was decided by the unanimous opinion of this

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court, that the declarations of one of the devisees in the will, the principal one too, and a party to the record, were inadmissible to prove the invalidity of the will on the trial of the issue *devisavit vel non*. This last case is in every particular like the present, and cannot in any manner whatever be distinguished from it.

But the force and authority of this last decision is attempted to be impaired, if not annulled, by a division of opinion in the court subsequently on the same question in the same cause, when a change had been produced in some of the members of the court arising from death or otherwise. See 1 *P. R.* 306. The only reason, however, given in support of the opinion of the two judges, who dissented from the prior decision of this court in *Dietrich v. Dietrich*, appears, in my humble judgment, to be insufficient to distinguish it from or take the case out of the principle established in the previous cases, which were then and have been now referred to. The ground of distinction taken was, that in *Dietrich v. Dietrich*, the devisee, whose declarations had been admitted in evidence by the court below, was a party on the record to the issue, whereas in *Bovard v. Wallace* and *Nussear v. Arnold*, the devisees, whose declarations were offered in evidence, were not parties on the record. But the interest of the persons named as devisees in the will in each case, was several and not joint; and when it is considered that the verdict and judgment rendered upon an issue *devisavit vel non*, ordered by the Register's Court for the purpose of passing on the validity or invalidity of the writing as a will, has the same effect and is alike binding upon all those named as devisees in it, whether parties on the record to the issue or not, it makes it difficult, if not impossible, to assign any good reason why the rule in regard to their admissions or declarations being inadmissible in evidence on the trial of such issue should not be the same, whether they be parties on the record or not. It must be admitted, however, that a diversity of opinion exists among juridical men in regard to the admissibility of such evidence, and that decisions have been made in favour of and against its admissibility by the different courts of some of our sister States. But even supposing it to be doubtful which is right, I consider that we are bound to follow and abide by our own, which show clearly, as it appears to me, that it is inadmissible. And I am willing to do this the more cheerfully, as I am satisfied that they are in accordance with reason and justice.

The second error, which we come to now, is an exception to the opinion of the court rejecting evidence offered by the defendants below, tending to show that Jacob Root, the testator, furnished his son John with money some fourteen or fifteen years before to buy a farm. It is alleged that this evidence ought to have been received, as it would have proved, in connection with other evidence, that John had a greater portion of the testator's estate given to him by the will than was consistent with an intention to

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divide the estate equally among his children. But how does it appear that it was the intention of the testator to distribute his estate equally amongst his children? It certainly does not appear on the face of the instrument itself. On the contrary, it appears pretty clearly that such was not his intention; for it is manifest that he has given more to his sons and their issue or children than he has done to his daughters. This, however, furnishes no evidence of imbecility of mind or want of capacity to make a will; for it is every day's practice in men of perfectly sane minds to make such inequality in the distribution of their estates by their wills amongst their children. Though it may be proper, where a will is impeached for imbecility of mind in the testator, accompanied by fraudulent practices of the devisees, for the jury to look into the will itself, and see whether the unreasonableness of the provisions contained therein be such as to strike the common mind with a sense of their injustice, taking into view the state of the testator's property, family, and the claims of particular individuals upon him, yet it is conceived that parol proof of the circumstance of his having made an advancement to one of his sons some ten or twelve years anterior to making his will, without making any mention of it therein, or having charged the son with it in any way, either in his books or otherwise, would be very unsafe evidence from which to infer inability to make a will, or that he was induced by the fraudulent practice of such son and devisee to make it differently from what he would otherwise have done. Under the circumstances of this case, as disclosed by the evidence which had been given at the time the evidence mentioned in the exception was offered, we think the evidence so offered was properly rejected by the court.

The fifth error is an exception to the opinion of the court, overruling an objection made by the defendant to the admission of an account or book in writing, made by the order of the testator and signed by him, containing a statement of monies paid or advanced by him to his three sons-in-law, John Albright, John Hauberger, and Daniel Hauberger, amounting to the sum of \$900 paid to each, which he mentions and refers to in his will, thereby declaring that the same "shall be their legacy in full out of my estate." It was objected to on the ground that the witness, who testified to his having written it for and at the request of the testator, testified also that he transcribed it from another paper which was destroyed; and therefore not being a book of original entries, it was improperly admitted by the court in evidence. But it is a mistake to suppose that it was either offered or received in evidence as a book of original entries. The testator, by referring to it in his will, had made it as it were a part thereof, and under this view we think it was admissible. Besides, having mentioned and referred to it in his will, it was some evidence to show his presence of mind and such knowledge of his affairs at the time

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of making his will as indicated capacity on his part to make it; as also the propriety of mentioning it, in order to satisfy every one as to the reason why he did not give them more by his will.

The sixth error is also an exception to the opinion of the court, overruling an objection made by the defendants below to the admission of evidence offered by the plaintiffs there, to prove how David M. Root, one of the plaintiffs, said he came by a note or bond belonging to the testator, which he had in his possession before and at the time of the testator's death, and which one of the defendants' witnesses testified that the testator, in his last illness during the week in which he died, said that David M. Root had taken from him (but David was not present when he said so). If the witness testified truly as to what the testator said about David's having taken his bond of \$200, it was evident that he intended to charge David with having taken it without his consent, for he said at the same time that he would not trust David further than he could see him, and that was not far, as his eyesight had become very dim, and then mentioned the taking of the bond as his reason for not trusting him. This evidence could only have been given to excite a prejudice in the minds of the jury against David, who was one of the plaintiffs and one of the executors named in the will. In order however to remove this effect, as also any other that might be produced, the plaintiffs proved that David produced the bond at the time of appraising the testator's personal estate, and had it inserted in the inventory as a part thereof, and further offered to prove that David mentioned at the same time that it was given to him for collection by the testator in his lifetime. An objection to this offer was made by the defendants, which the court overruled, and is the same which is made the foundation of the sixth error. We think it would have been treating David unfairly, not to have permitted him to show that he acted correctly in regard to the bond, and to put the defendants at defiance; and to show, if they could, that he had ever acted otherwise.

Judgment affirmed.

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The defendant executed an agreement under seal reciting a bond and mortgage for \$4000 from B. to the plaintiffs, by which he covenanted, in case a sheriff's sale of the mortgaged premises should not satisfy the amount of the bond with interest and costs, over and above all liens, claims and demands, to pay the difference; and guaranteed the premises free from mechanics' liens. Appended to the specialty was a parol agreement of same date by the plaintiffs that when and so soon as \$750 should be paid them in part satisfaction of the bond, the guaranty should be cancelled, provided sufficient releases of the mechanics' liens on the premises should be previously given to them. The plaintiffs afterwards sued out the bond, on which the premises were sold for \$2000 and distribution made by an auditor of \$552.64 for mechanics' liens, &c. and the balance to the plaintiffs on their mortgage. The plaintiffs brought covenant against the defendant on the specialty to recover the balance of the bond.

Held, 1. That covenant was the proper form of action, and that the plaintiffs might give the specialty in evidence without the parol memorandum.

2. That the report of the auditor was evidence to show how much was awarded to the plaintiffs.

3. That the parol agreement, depending, as it did, on an unperformed condition, was not an obstacle to the plaintiffs' demand.

4. That in such action the defendant might set-off a loss under a policy of insurance on the mortgaged premises executed by the plaintiffs to a third person and assigned by him to the defendant.

5. That the want of a direct averment in such plea of interest in the property insured could only be taken advantage of on special demurrer.

An unliquidated cross-demand arising from a distinct and independent contract may be set-off.

ERROR to the District Court for the city and county of *Philadelphia*.

This was an action of covenant brought by the Franklin Fire Insurance Company of Philadelphia against Hannah Ellmaker, executrix of Levi Ellmaker, deceased. The defendant pleaded "covenants performed, with leave," &c., and also specially, that "on the 20th November 1834, the plaintiffs, in due form of law, executed their policy of insurance to a certain John M'Michael, whereby the said plaintiffs insured against loss and damage by fire, for the consideration therein mentioned, two unfinished three story brick buildings on the east side of Schuylkill Sixth street, between Filbert and Jones streets, to the amount of \$3000, or \$1500 on each of the said buildings, in case of loss, payable to the said Levi Ellmaker, now deceased, which said policy of insurance was duly assigned with the knowledge and assent of the said plaintiffs, by the said John M'Michael, to the said Levi Ellmaker, during the lifetime of the said Levi, to wit, on the 31st December 1834, and was regularly and duly renewed by the said plaintiffs,

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upon the expiration of the time in the said policy mentioned, for the continuance of the insurance therein provided for: and that after the renewal of the said policy of insurance, the two buildings therein mentioned were destroyed by fire within the time during which the said insurance continued, to wit, on the — day of September 1835, whereby a loss accrued under the said policy, and the renewal thereof to the defendant, to the extent of the sum of \$3000 in the said policy mentioned; which said sum of \$3000 the defendant now claims to be allowed, defalked, and paid by the said plaintiffs; and this the said defendant is ready to verify," &c.

On demurrer to this plea the court rendered judgment for the plaintiffs.

The plaintiffs gave in evidence a bond and mortgage dated 11th September 1834, given to them by William M. Bozarth, in the penal sum of \$8000, conditioned for the payment of \$4000: and then offered in evidence the following sealed instrument executed by Levi Ellmaker on the 13th September 1834; to which the defendant objected; but the court admitted it and sealed an exception.

"Whereas, by a certain bond or obligation bearing even date herewith, William M. Bozarth, of the city of Philadelphia, house carpenter, stands bound to the Franklin Fire Insurance Company of Philadelphia, in the penal sum of \$8000, lawful money of the United States, conditioned for the payment of \$4000 of like lawful money, in one year from the date, with interest at the rate of six per cent. per annum, as is therein expressed; and for the better securing the same has, by indenture bearing even date herewith, conveyed in mortgage to the said the Franklin Fire Insurance Company of Philadelphia, a certain messuage or tenement and lot or piece of ground, situate on the south side of Filbert street, between Schuylkill Sixth and Seventh streets, in the said city, containing in front or breadth 18 feet, and in depth 106 feet, as the same is more particularly described in the said mortgage. And whereas the said sum of \$4000 was lent to the said William M. Bozarth, on condition of a guaranty of the same, by Levi Ellmaker, of the city aforesaid, merchant, and in consideration thereof: Now these presents witness that I, the said Levi Ellmaker, in consideration of the premises, and of the sum of one dollar to me paid by the said the Franklin Fire Insurance Company of Philadelphia, the receipt whereof is hereby acknowledged, do, for myself, my heirs, executors and administrators, covenant, grant and agree to and with the said the Franklin Fire Ins. Co. of Philadelphia, that in case the said messuage and lot shall be sold at the sheriff's sale, by virtue of process upon the said mortgage, or otherwise, and shall not produce enough to satisfy the said debt to them of \$4000, with the interest and costs, over and above all prior liens, claims and demands whatsoever, I will pay to the said the Franklin Fire Insurance Company, their successors or assigns, so much as shall

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be wanting to satisfy the said debt, interest and costs. And I do further covenant and guarantee to the said the Franklin Fire Insurance Company of Philadelphia, that the messuage or tenement aforesaid is free and clear from all liens or claims of mechanics or others, arising from the erection or construction of the said buildings, or from the materials used in the same, so that the security of the said mortgage debt shall not at any time hereafter be impaired or otherwise affected by reason of any lien upon the premises, arising from debts contracted for work done or materials furnished for or in the erecting or constructing of the same."

The plaintiffs then offered in evidence the record of a suit brought in the District Court to December term 1835, by the plaintiffs, against Bozarth on the above bond, showing a judgment therein, the proceedings on it, a sheriff's sale of the mortgaged property, and its purchase by the plaintiffs, and the report of the auditor appointed by the court to distribute the proceeds. The defendant objected to this evidence, but the Judge admitted it and the defendant excepted.

The auditor's report, which was confirmed, stated that the premises were sold for \$2000, and appropriated \$424.21 to the payment of mechanics' liens, and \$128.43 for costs, taxes, &c., and the balance (\$1447.36) to the plaintiffs on account of their judgment.

The defendant gave in evidence the following agreement, appended to the foot of the instrument given in evidence by the plaintiffs:

It is agreed that when and so soon as the sum of \$750 shall be paid to the Franklin Fire Insurance Company of Philadelphia, in part satisfaction of the principal of the above-mentioned bond, the foregoing guaranty shall be cancelled, and the paper delivered up to the aforesaid Levi Ellmaker; provided, that sufficient releases of the liens of the mechanics and others concerned in the erecting or constructing of the said building, shall previously thereto be produced and filed in the office of the said company.

C. N. BANCER, *Sec'ry.*

Sept. 13, 1834.

The defendant requested the judge to charge the jury:

1. That the action of covenant cannot be sustained on the evidence in this case, but that assumpsit is the proper form of action.

2. That the plaintiffs have been fully satisfied in any claim they have on the defendants, by the sale of the property, the receipt of \$1447.36, and the legal extinguishment thereby of the liens referred to.

3. That at all events, according to the true construction of the whole instrument, the plaintiffs can only recover the \$750 with interest.

The Judge refused to charge the jury as requested, but charged

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them that the law was with the plaintiffs upon these several points:

The defendant excepted to the charge.

Errors assigned:

1. Because the court admitted the plaintiff to give in evidence a part of the instrument in question, and to exclude the remainder.
2. Because the court admitted the auditor's report to be read in evidence of the facts therein stated.
3. Because the court decided that covenant was the proper form of action, and not assumpsit.
4. Because the court charged the jury, that the plaintiff had the right to recover in this suit the remainder of the sum of \$4000, with interest, after deducting the sum of \$1447.36 received by the plaintiff from the sheriff's sale of the property in question.
5. Because the court refused to charge the jury, that the plaintiff could, under the circumstances, only recover the sum of \$750, with interest.
6. The court erred in rendering judgment for the plaintiffs, on the demurrer to the plea of set-off.

Rawle and *Randall*, for the plaintiff in error, contended that the auditor's report was not evidence, being *res inter alios acta*. That the proper action would have been assumpsit and not covenant, inasmuch as the sealed instrument was altered and modified by the parol agreement annexed. *Vicary v. Moore*, (2 *Watts* 451); *Vaughn v. Ferris*, (2 *Watts & Serg.* 46). That the court erred in sustaining the demurrer, as the matter contained in the plea was a subject of defalcation under the act of 1705. *Kachlein v. Ralston*, (1 *Yeates* 571); *Gogel v. Jacoby*, (5 *Serg. & Rawle* 122); *Cornell v. Green*, (10 *Ib.* 14); *Hubler v. Tamney*, (5 *Watts* 51).

T. I. Wharton and *J. M. Scott*, contra. The auditor's report was evidence for the only purpose for which it was offered, viz., to show how the monies were appropriated. Covenant was the proper action, the annexed agreement being a condition in defeasance of the instrument, which it was incumbent on the defendant to take advantage of by plea. *MCombs v. M'Kennan*, (2 *Watts & Serg.* 216); *Green v. Roberts*, (5 *Whart.* 84). The set-off was not admissible, being unliquidated damages, arising out of another transaction; and the plea was defective in not alleging that the defendant had an interest in the policy. *Shaw v. Badger* (12 *Serg. & Rawle* 275); *M'Fadden v. Erwin* (2 *Whart.* 39).

The opinion of the Court was delivered by

GIBSON, C. J.—Had the auditor's report been received without the rest of the record, it might have been deemed error; but the whole was given entire, and to show what? Not the truth of any fact adjudicated, but how much of the money raised from the

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mortgaged property was paid on the judgment. The order of distribution was itself an independent fact, and, for the end proposed, evidence against, not only parties or privies, but all the world.

The question in regard to the contract declared on, is raised by the first and third exceptions. In form it is a covenant of guaranty, to which is appended a parol agreement bearing the same date, and executed, it is to be presumed, at the same time. Were it executed subsequently, it would be without consideration, and the original covenant would be unaltered in its character or its terms. But granting the execution of the covenant to be a consideration for the parol agreement, in what respect does the one impinge on the other? Where writings are executed at the same time and on one common subject, they are to be interpreted so as to be brought into concord with each other as consistent parts of a whole. Now the guarantor *covenanted* to make up the difference should the mortgaged promises fall short of the debt after payment of the mechanics' liens; and the mortgagee *promised* that the guaranty should cease as soon as the liens should be extinguished and a particular part of the debt paid. But it was to stand good in the meantime. How then can its nature, as a specialty, have been altered, or its hue changed by the shadows of coming events? The parol agreement was not to modify the covenant, but to regulate the application of it as a security. Circumstances might happen which would make it unnecessary, and in that event the guarantor was to be released from it. In *Vicary v. Moore* the test of collision was the capacity of the two contracts to be executed together. Where that can be done, the one is not substituted for the other; and where there is in fact substitution, it operates as abandonment, the specialty being relinquished except as matter of reference for the terms of the parol contract which has supplanted it. Now it cannot be supposed that this covenant was intended to be relinquished as a specialty the moment it was made; for had it been designed to play the humble part of a parol promise, it would have been put into the garb of one. The action was properly brought in covenant, therefore, and the plaintiff was properly allowed to introduce the specialty without the parol memorandum, which contained nothing but matter of defence.

Its effect as such, however, was not what the guarantor attempted to assign to it. It was a defeasance, but the condition of it had not been performed. The mechanics' liens had indeed been extinguished, but not by Bozarth, the debtor, as was contemplated, or by the defendant, his surety. They were to be discharged in ease of the mortgage, instead of which they were discharged out of the proceeds of the premises sold subject to them, and in prejudice of the mortgagee; consequently in accordance with neither the letter nor the spirit of the proviso. The plaintiff consented to take the property alone as security for a

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part of the debt, provided the other part of it and the prior liens were paid by the defendant or his surety. The liens have indeed been paid; but how? Not by the debtor or his surety, but by the mortgaged premises at the plaintiff's expense. The jury were properly instructed that the agreement, depending as it did on an unperformed condition, was not an obstacle to a verdict for the plaintiff's demand.

But we are unable to sustain the demurrer to the plea of set-off, which the court should have overruled, and, had it been required, allowed to be withdrawn in order to meet the plea on its merits.

The reverse of the principle assumed on the first ground taken at the argument, has been ruled at the present term: a conclusion towards which our decisions have long been tending. We have gradually enlarged the effect of our act for defalcation by discarding notions derived from the English statute of set-off, till we have brought it to the line of the enactment. There is not a word in the English statute about mutual dealing; or about being indebted by bonds, bills, bargains, promises, or accounts; or about the defendant's being unable to gainsay the deed, bargain, or assumption—expressions in ours which indicate an unsettled course of dealing—nor is there any thing in it to show that the words, "mutual debts," the only descriptive ones contained in it, were not to have their technical effect. In our statute, too, the words "debt or sum demanded," seem to have been introduced intentionally to enlarge the purview. True it is that both statutes are susceptible of the same construction without much violence to the words, and that we have been in the habit of receiving English precedents in questions of set-off: but it has seemed that neither justice nor convenience called on us to depart from the obvious and natural meaning of our own. If an unliquidated cross demand may be set-up when it has sprung from the same transaction—and we have constantly ruled that it may—why may it not be set up when it has sprung from a distinct and independent contract? The confusion incident to the trial of distinct issues in the same action is no greater where the demands are independent of each other than where they are connected; nor more embarrassing where they are indefinite than where they are liquidated; nor more complicated where they are set against each other than where they are joined in the same declaration or in consolidated actions. The practical difference between a debt properly so called and an indefinite demand of money resting in contract, is more seeming than real. A bond for the payment of a sum certain is strictly a debt and a subject of set-off; yet to ascertain the amount due on it when reduced, as it sometimes is, by failure of consideration or a variety of causes, is often one of the most difficult duties that can be committed to a jury. When its definite character is so often deceptive, what better claim has

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it to be made matter of set-off than a policy of insurance? The trial of cross demands in the same action saves expense and the vexation of paying out money to get it back at the risk of losing it by insolvency in the circuit. It is enough, for the occasion, however, that the point has been settled by decision since the cause before us was tried.

Nor is it material under the 27 Eliz., c. 5, that the plea contains no *direct* averment of an interest in the property insured. It is not to be denied that the want of such an averment would be fatal on special demurrer; for the 14 G. 3, c. 48, which enacts that insurance shall not be made by one who has not an interest in the property, seems to be declaratory of the common law; and it is unimportant that it is not in force here. Lord KING had held such an interest necessary so early as *Lynch v. Dalzell*, (4 Bro. P. C. 431), and Lord HARDWICKE had held the same thing in *The Sadlers' Company v. Badcock*, (2 Atk. 554). But independent of positive enactment, as insurance is now held to be a contract of indemnity and not of wager, it would be difficult to see how any one could claim compensation for a loss which he had not suffered. In *Pritchett v. The North American Insurance Company*, (3 Yeates 464), and *Craig v. Murgatroyd*, (4 Yeates 168), it was held that the leading principles of the 19 G. 2, c. 37, which requires an interest for the foundation of a marine insurance, have been adopted in Pennsylvania by commercial usage. Perhaps it might have been more accurately said, that the statute was designed to restore the original principles of the contract, which had been prostituted to gambling purposes by the insertion of the words "interest or no interest." These words never found their way into policies against fire, and as there was no necessity for a restorative, the 14 G. 3 was perhaps unnecessary. Lord HARDWICKE said, in *The Sadlers' Company v. Badcock*, that insurances against fire were introduced in later times, and that they differ from marine insurances in this very particular. At all events, it might be said that the leading principles of the 14 G. 3, like those of its marine fellow, have been followed by us in practice. So far the plaintiff's argument is incontrovertible. But though the plea in this instance contains no direct averment of interest, it contains a direct averment of loss which could spring from nothing but an interest. Grant that such a plea is argumentative, yet it is certainly good on general demurrer. It was to remedy such slips that the 27 Eliz., c. 5, required the party to put his finger on the very point. At the common law a demurrer confessed all things formally pleaded: since the statute, it confesses all things informally pleaded, which are helped by the 4 and 5 Anne, c. 16, and not specially set down as causes of demurrer. This is said to be the rule by the text writers, particularly Sergeant WILLIAMS, in *Hancocke v. Prowd*, (1 Saund. 337 n. 3), and it was so laid down

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by Chief Justice KENT, in *Spencer v. Southwick*, (9 Johns. 314). The existence of an interest here was informally asserted; but as the demurrer was not a special one, it ought not to have been sustained.

Judgment reversed, and a *venire facias de novo* awarded.

Ex Parte Peneveyre.

One owning a ground rent and bound by covenant to release it on being paid the principal, died, leaving an executor and devising his estate one half in trust for the wife of the executor, the other half to another person, and the ground rent was subject to a general lien for the testator's debts, and to a mortgage by and judgments against the testator. Decreed that the executor and wife should join in a release, on the executor's receiving the amount due, he first giving bond as directed by the Act of Assembly.

CHARLES PENEVEYRE petitioned this court, stating that Catharine Hanchman of the city of Philadelphia, widow, by indenture dated the 22d of May 1834, granted and conveyed unto Charles F. Souder, of said city, his heirs and assigns, a certain brick messuage or tenement and lot or piece of ground, situate on the south side of Sassafras street, between Delaware Fifth and Sixth streets, in said city, &c., yielding and paying therefor unto the said Catharine, her heirs and assigns, the yearly rent or sum of \$168, lawful silver money of the United States of America, in equal half-yearly payments on the 20th day of the months of May and November, in each and every year thereafter forever, without any deduction or abatement for taxes or charges. And by the said indenture it was provided, that if the said Souder, his heirs or assigns, should, and did at any time within ten years from the date thereof, pay or cause to be paid to the said Catharine, her heirs or assigns, the just and full sum of \$2800, lawful money aforesaid, and the arrearages of the said yearly rent to the time of such payment, then the said yearly rent thereby reserved should forever thereafter cease and be extinguished, and the covenant for payment thereof should become void, and then she, the said Catharine, her heirs and assigns, should and would at the proper costs and charges in the law of the said grantee, his heirs or assigns, by some proper deed or assurance in the law to be well and sufficiently executed and acknowledged, grant, release and extinguish the said yearly rent thereby reserved, and all her and their estate and interest in and to the said lot of ground thereby granted, with the appurtenances, unto the said Souder, his heirs and assigns for-

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ever, anything therein contained before to the contrary thereof notwithstanding: as by the said indenture duly acknowledged and recorded, &c.

That the said premises, subject to the said ground rent, have since, by virtue of sundry conveyances, become vested in your petitioner, Charles Peneveyre, in fee, and that the said Catharine Hanchman, after the making of the said indenture died, being seised in fee of the said rent, and having first made her last will and testament, bearing date the 18th day of May 1842, and duly proved, whereby among other things she did order all the rest, residue and remainder of her estate, real, personal and mixed, (including the said ground rent), whatsoever and wheresoever, to be divided into two equal parts or shares, and one full equal half part or share she did thereby give, devise and bequeath unto Joseph G. Auner, of the city of Philadelphia, bookseller, his heirs, executors, administrators and assigns, in trust nevertheless to and for the following uses, intents and purposes, that is to say, in trust to collect and receive all the rents, interests, incomes and profits thereof, and pay over the same, when and as received, unto her niece Catharine Lents, for her own use, notwithstanding any coverture, for and during all the term of her natural life, free from the intervention and control of any husband she may have or take, and without being in any way or manner subject to or liable for any of his contracts, debts or engagements, and from and immediately after the death of the said Catharine Lents, then upon the trusts specified in the said will, as by reference thereto will fully appear. And the other and remaining one full equal half part or share of all the said rest, residue and remainder of her estate, real, personal and mixed, whatsoever and wheresoever, the said testatrix did devise and bequeath unto her niece, Mary Ann Auner, wife of the said Joseph G. Auner, to hold to her, her heirs, executors, administrators and assigns forever; and the said testatrix then and thereby nominated and appointed the said Joseph G. Auner executor of her said last will and testament, to whom letters testamentary were regularly granted, upon probate of the said will having been duly made.

And your petitioner further sheweth, that the said ground rent hath in this manner become vested partly in a trustee, to wit, the said Joseph G. Auner, and partly in a person not authorized to release or extinguish the same. And he respectfully prays the honourable court, that upon consideration of the prayer of this petition and the contract whereon it is founded, they may make an order authorizing and requiring a release or discharge of the said ground rent, to be executed by the said Joseph G. Auner, executor of the said grantor, Catharine Hanchman, and by him as trustee, and any other parties whose assent or joinder therein may be deemed necessary unto your petitioner, in such manner and form as the honorable court shall judge to be consistent with

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the true intent and meaning of the parties to the deed by which the said rent hath been reserved, on payment of all arrearages of rent and of the additional sum of money specified in the deed as aforesaid, according to the Act of Assembly in such cases made and provided."

Joseph G. Auner, executor of the last will and testament of Catharine Hanchman, deceased, answered, "that it is true that the said Catharine Hanchman, deceased, granted and conveyed the premises in the said petition described, unto Charles F. Souder, reserving the ground rent therein set forth, and that she did covenant to grant, release and extinguish the said rent on payment within ten years of the sum of \$2800, and the arrearages of the said yearly rent to the time of such payment; and the said executor believes it to be true that the said petitioner is now seised in fee of the said premises subject to the said ground rent.

And the said respondent also says, that it is true that the said Catharine Hanchman departed this life seised in fee of the said rent charge, and that by her last will and testament duly proved, she devised and bequeathed her estate as in the said petition recited, and that letters testamentary were duly granted to the respondent, and that he is willing and ready to execute a deed of release and extinguishment of the said rent charge on payment of the said sum of \$2800, and the arrearages of the said yearly rent to the time of said extinguishment and release, but that the said ground rent (together with others) is incumbered by a certain mortgage for the payment of \$3500 (made by the said Catharine Hanchman in her life time) to Thomas Lee and Alfred Lee, executors of Benjamin Lee, of Norwich, Connecticut, deceased, and also by the lien of a judgment for \$8000, upon a bond given by Catharine Hanchman to William D. Lewis, obtained and now held by the assignees of the said William D. Lewis, against the said Catharine Hanchman, and also by the lien of a judgment for \$1000, upon a bond given by the said Catharine Hanchman to the respondent for a like sum, and the respondent does not know whether he is or can be legally authorized and empowered to execute a deed of release and extinguishment of the said rent charge, on payment of the said sum of \$2800, the said rent being devised to the parties set forth in the said petition as part of the residuary estate of Catharine Hanchman, and also being incumbered as above stated: and he prays the Court to take the same into consideration, and to make such order thereon as to right and justice shall appertain."

The questions submitted to the court were:

1. A part of the premises being subject to a trust, without any authority in the trustee to extinguish the ground rent, is not the deed to be executed for the whole by the executor?

2. Do not the liens for debts arising, 1st, from specific incumbrances, or, 2d, from the general lien for the payment of debts

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upon the death of the ground-landlord, authorize the court to direct the extinguishment of the rent by the executors?

3. If the executors neglect or refuse to give security, will not the court order the money to be paid into court to be distributed according to law?

Clay and Williams, for the petitioner.

W. L. Brown, for the executor.

This court made the following decree :

It appearing to the court from the pleadings in this case,

1. That the ground rent therein mentioned is by the terms of the deed reserving the same subject to redemption.

2. That Catharine Hanchman, the grantor, by whom the said ground rent was reserved, died leaving a will, whereby she appointed Joseph G. Auner her executor.

3. That the said ground rent is subject to a general lien for the payment of the debts of the decedent under the Act of Assembly—to specific liens by mortgages given by and judgment obtained against the testatrix during her life; and also in part to certain trusts created by the said will, in consequence whereof there is no person authorized to release and extinguish the ground rent aforesaid.

Now, therefore, it is hereby adjudged by the court, that the said contract for the redemption of the said ground rent is valid and obligatory between the parties.

And it is hereby ordered, that Joseph G. Auner, the executor of Catharine Hanchman, deceased, shall be and he hereby is authorized and required, upon the payment to him of the principal of said ground rent in the deed reserving the same mentioned, and all arrears and interest due thereon, to execute and deliver unto the said Charles Peneveyre and his heirs, a full, sufficient and absolute release of the said ground rent.

Provided, that before the execution of said release and perfecting the title as aforesaid, the said Joseph G. Auner shall give bond to the commonwealth in the sum of three thousand dollars, conditioned for the proper and legal distribution of the money so to be paid as aforesaid.

And it is hereby further ordered, that the said Joseph G. Auner, and Mary Ann his wife, shall be made parties to the said release, and shall be required to execute and deliver the same.

Bisbing *against* Albertson.

A plaintiff cannot have judgment for want of a plea, where no rule to plead has been entered on the docket.

ERROR to the Common Pleas of *Philadelphia* county.

Albertson obtained judgment against Bisbing before a justice of the peace on the 7th June 1841, from which the defendant appealed on the 18th August, and the same day filed an affidavit of defence. On the 4th September a declaration was filed. On the 25th June 1842 judgment was entered for want of a plea on the affidavit of the plaintiff's counsel that on the 13th May previous he served a notice to plead at the defendant's counting-house, on persons, as he understood, in the defendant's employ. On the 9th July a rule was taken to show cause why execution should not be set aside and judgment opened, on the affidavit of the defendant that he never received notice to plead; that he was always ready to plead and had put in an affidavit of defence. This rule was refused.

Errors assigned:

1. That there was no rule on record in the court below to plead at any time.
2. That the proof of a notice to plead by the plaintiff's counsel was not in accordance with the rule of said court requiring notice to parties required to plead in said court.

H. Hubbell, for plaintiff in error. The notice to plead was irregular, no rule to plead appearing on the record. But the notice given here was not according to the rule of court, which directs that if the party entitled to notice has not employed an attorney it shall be sufficient to serve a copy on the party, which means personally or at his dwelling-house. The notice must be according to a rule of court or an Act of Assembly. 2 *Rawle* 287.

Williams, contra. It was the fault of the clerk that no rule to plead was entered. The notice to plead was served at the defendant's counting-house, after due diligence was used to find his residence. The affidavit does not state that the defendant had a dwelling-house, or that the place at which the notice was left was not his usual place of business. It was not until six weeks after the notice was served that we obtained judgment.

PER CURIAM.—There seems to have been no rule to plead taken when the plaintiff signed judgment for want of a plea; and the defendant, therefore, was not in contempt. The cause, therefore, will have to be put at issue in the usual way.

Judgment reversed, and a *procedendo* awarded.

590.1.1. 328

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OF N.Y.

CASES

IN

THE SUPREME COURT

OF

PENNSYLVANIA.

WESTERN DISTRICT, SEPTEMBER TERM, 1843—CONTINUED.

M'Elroy's Case.

Upon a traverse of the inquisition found upon a commission of lunacy, the question is whether the mind is deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties.

ERROR to the Common Pleas of *Allegheny* county.

This was a commission of lunacy taken out against Samuel M'Elroy and a traverse of the inquisition. On the trial the counsel for the traverser presented the following points for the court's instruction to the jury:

1. That the fact of Samuel M'Elroy being under a delusion upon some particular subjects, (if such be the case), is not sufficient to authorize the jury in finding him of unsound mind within the meaning of the Act of Assembly and Constitution of the State.

2. That the fact of Samuel M'Elroy being under such delusions in relation to some members of his family, as to lead him to ill treat and abuse them, is not sufficient to justify the jury in finding him of unsound mind as aforesaid.

3. That in order to justify such finding, there must be an entire unsoundness of mind, or, in the language of the Supreme Court,

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he must be "wholly void of memory and understanding," and he must be entirely unfit for the management of his estate and for the care of his person.

4. That unless the jury believe that the traverser is so wholly deprived of understanding as to render him incapable of entering into any contract, that the law would regard the same as of no validity, and avoid it, in the absence of any proof of fraud or circumvention, their verdict should be for the defendant.

5. That if the jury believe, upon the whole evidence, that the mind of the traverser has heretofore and up to this time been sane in reference to the acquisition and transfer of property, and the proper care of it while in his possession, then their verdict must be for the defendant.

The relators requested the court to charge the jury: "That if they are satisfied from all the testimony in the cause that the traverser is of unsound mind, and is not capable of the government of himself and his property, they ought to find for the Commonwealth; and that to constitute unsound mind, it is not necessary that he should be insane on all or any specific number of subjects, or totally destitute of reason and intellect on all subjects."

PATTON (President). In England, by the common law, the king, who was *parens patriæ*, political father and guardian of the kingdom, was bound in a more peculiar manner to take care of all those who, by reason of their imbecility and want of understanding, were incapable of taking care of themselves; and by early statutes, the care of the persons and estates of idiots and natural fools, at first, and afterwards of lunatics, was made one of the prerogatives of the crown. The king took the profits of the idiot's estate to his own use, only allowing the idiot sufficient for the support of himself, and his family, when he had one. But before the king could enter on the lands or take possession of the property of the idiot, it was necessary that an inquisition should be held. For this purpose a commission was granted by the Lord Chancellor usually to five commissioners, empowering them to summon an inquest by writ to the sheriff, and inquire if the person be a lunatic, &c. If at the return of the inquisition any persons felt themselves aggrieved, formerly their only remedy was by petition to the king or *monstrans de droit*, but afterwards, by stat. 2 and 3 Edw. 6, c. 85 and 86, it was provided, that "if any person be untruly found an idiot or lunatic, every person aggrieved by such office or inquisition shall have their *traverse* to the same immediately, or after, and proceed to trial thereon, and have like remedy and advantage as in other cases of *traverse* upon untrue inquisitions or offices found." In Pennsylvania, the power exercised by the Court of Chancery (in England) over the estates of idiots and lunatics is vested in the Supreme Court, and several Courts of Common Pleas, by the Constitution of the State. This power has since been exercised by these courts in conformity with the prac-

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tice and usages of the Court of Chancery. By the late Act of the 13th June 1836, the practice has been modified, in some few particulars, as, for instance, "the commission may issue to only one commissioner," "the inquisition may consist of only six members," &c. The 1st section provides, that every person aggrieved by any inquisition as aforesaid, may traverse the same upon or after the return of the same, and proceed to trial therein, and have like remedy and advantage as in other cases of traverse upon untrue inquisition or office found.

In this case an inquisition has been held, finding M'Elroy, a lunatic, a person of unsound mind and incapable of managing his own affairs. He alleges that he has been aggrieved, and traverses the finding; and the question for the jury to determine is, whether he is a person of unsound mind and incapable of governing himself or managing his affairs. In deciding this question, it is important to determine the meaning of the word "lunatic" under the late Act of Assembly. Until within a few years past, the most correct and comprehensive term used in the law, to include all sorts of mental unsoundness, was the phrase "*non compos mentis*," meaning, says Littleton, of non-sane memory, or, as we would now translate it, "of unsound mind." This phrase, says he, is the most sure and legal, and includes all others, whether *amens*, *demens*, *furius*, *lunaticus*, *fatuus*, or *stultus*. Lord COKE also considers *non compos mentis* not only the legal, but the sure term, and divides it into four sorts. 1. An idiot, who from his nativity, by a perpetual infirmity, is *non compos mentis*. 2. He that by sickness, grief or other accident, wholly loseth his memory or understanding. 3. A lunatic, who hath sometimes his understanding and sometimes not. 4. A drunkard, who by his own vicious act depriveth himself of understanding.

The word "lunatic," which is now used as a generic term, was not used as such in ancient statutes or proceedings, the phraseology often used being "persons of unsound mind." It is derived from *luna*, and was brought into use through a vulgar error, though one of great antiquity, that persons subject to temporary or chronic insanity, epilepsy, &c. were somehow under the influence of the moon. Hence, even in the Greek, a language more ancient than the Latin, we find this sort of mental derangement or affection taking its name from the moon. A lunatic, therefore, according to former legal phraseology, signified one that had lucid intervals, sometimes not. In the Constitution of Pennsylvania, (Art. 5 § 6), the phrase used as the comprehensive and general one, is *non compos mentis*. But modern legislation has changed the relative legal philological use of the term lunatic, and has substituted it in the place of the old Latin phrase, *non compos mentis*. So that now, instead of denoting a species, it is the generic term in legislative technology for all sorts of mental unsoundness. The statutes of 11 Geo. 4, and 1 W. 4, declare that the word "lunatic" shall

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extend to any idiot or person of unsound mind, or incapable of managing his affairs. The Act of 1836 uses the word *lunatic* in the same manner, in place of the old generic term in the common law and the Constitution; and section 67 enacts that the word "*lunatic*" in this Act shall be construed to mean and include every person of *unsound mind*, whether he may have been such from his nativity or have become such from any cause whatever.

The jury are therefore to inquire whether M'Elroy be a person of unsound mind or not; and if they believe him to be a person of unsound mind, it is their duty to say so, no matter from what cause the mental unsoundness proceeds. The existence of insanity is a fact which is best determined through the intervention of a jury. It presents a question which in many cases it is difficult to decide. Insanity exists in an endless variety of shapes and forms and degrees — from raving madness down to the slightest species of monomania. Eccentricity does not amount to insanity. A man may do the most extravagant things; he may recklessly squander his money; his conduct may be the subject of ridicule; he may be addicted to sudden bursts of passion and of harsh treatment towards those whom he should treat with tenderness; his deportment on a particular occasion may be an outrage upon decency and propriety. All this, if it be the result of eccentricity of character, or of depraved taste, or an unfortunate temper, and does not proceed from a permanent disorganization of the mental faculties, cannot fix upon a man the charge of insanity. Mere imbecility or weakness of mind is not insanity. You often hear the expression applied to a man "he is a very weak man," "he is a man of very weak mind." Because a man's mind may be weak compared with the more vigorous intellect of others, he is not therefore insane. Insanity, except in the case of idiots, who labour under a perpetual infirmity from their birth, implies a derangement in some shape or form of the intellect. It cannot be presumed from a single instance of unreasonable behaviour. It is a permanent affection of the mind.

3. We have been requested to charge the jury that to justify them in finding M'Elroy a person of unsound mind, they must believe him "wholly void of memory and understanding," and entirely unfit for the management of his estate and the care of his person. We are asked to say first, that nothing short of a total deprivation of mind will justify such a finding. We cannot so charge the jury. This is not the law, if the point is to be taken in the literal sense of the words in which it is conveyed. If this were the law, the wholesome operation of proceedings in cases of lunacy would be totally defeated. For there are perhaps but two classes of persons who can be said to be wholly deprived of their understanding. Idiots, or those whose mental fatuity comes with them into the world, form one class. An idiot has been described as a natural fool, or one who has laboured under fatuity from his

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birth, or one who knows not to tell twenty shillings, nor knows his own age, or who was his father. Another class consists of those who have been in the possession of a sound mind, but are totally deprived of it by some accident, some dispensation of Providence. You may trace instances of it in cases where the citadel of the mind is taken as it were by storm; where by some sudden calamity, reason is dethroned and madness usurps her place; where the unfortunate victim becomes a raving maniac—sees a deadly foe in every friend—knows not his father, his brother, his wife, or his child from a stranger, and turns against his own person as instruments to mutilate and destroy it, the hands that his Maker has given him for his benefit and protection; or when he becomes, after a life of sanity from his birth, seized with fatuity, and sinks into the listless condition of a natural fool. Such are the classes of persons who can be said to be wholly deprived of understanding. Insanity can be easily traced in the idiot and in the raving maniac who is chained to the floor to save him from himself and to secure those around him from violence.

But we have no idea that insanity stops here; it may extend to persons who are perfectly rational upon several subjects, but labour under a permanent delusion as to one or more. It may be found in a great variety of forms, from monomania or derangement on a single subject, to frantic madness, which involves a total loss of reason, and an entire alienation of the mental faculties. A person may converse with intelligence—he may display more than usual acuteness upon ordinary subjects, and yet in regard to others he may be in a complete state of delusion, and that delusion may be so fixed and permanent that no argument nor persuasion can disturb it. Will it be contended that such a person is free from insanity? Is it not evident that there is a disorder existing that not only implies insanity itself but is latently undermining the reason and spreading disorganization through the faculties of the mind?

A sound mind has been held to be one free from all delusion, when all the intellectual faculties exist in the usual and proper degree of harmony and vigour, and when the passions, affections and propensities are under the subordination of the judgment and the will. An unsound mind is marked by delusion. It takes the offspring of its own imagination for realities; it has not a proper perception of the natural connection or repugnancy of ideas. There are no delusions which more fully stamp the mind with the character of unsoundness, than those which are attended with an insensibility to or a perversion of the paramount feelings and dictates of our nature. Delusion manifests itself in a callousness to a just sense of affection. Strong traces of its inroads on the intellect are found, where a man hates without cause those who were formerly most dear to him; when he takes delight in acts of cruelty which are revolting to our nature; when he pertina-

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ciously adheres to some delusive idea, in opposition to the plainest evidence of its falsity; when a man conceives something extravagant to exist, which has in fact no foundation or existence, and adheres to it permanently in spite of all that can be done and said to reason him out of the conceit, then he is the victim of a permanent delusion, and whenever there is such a delusion, there is insanity or unsoundness of mind.

An insane delusion is exhibited in the belief of facts which no rational person would have believed. This delusion may exist in relation to a great variety of subjects, or it may be confined to one or two. When the delusion is thus limited, its existence is generally confirmed, and its insane character established by concurring circumstances; by irritability, violence, suspicion, and inconsistency in the mind and conduct of the possessor. It is held that the absence or presence of such permanent delusion on any subject or subjects forms in most cases the true and only test of insanity. Wherever it exists, there is insanity. In some cases the delusion grows in the first instance out of some slight circumstance, which it broods on and gradually magnifies. In other cases it takes its start in the adoption of some absurd prejudice which has no foundation. It has been decided that where there is a parent who has a child, and that child, who has really done wrong in some particulars, is fancied by him to be "a fiend and an incarnate devil," and he permanently acts upon that idea, he is in a state of morbid delusion and insanity. How much more so would he have been considered, had his child's conduct been perfectly irreproachable. When the mind labours under this sort of delusion in regard to particular subjects, it is called in the books *partial insanity*, as distinguished from *total insanity*, such as *idiocy*, or *raving madness*. But this is a distinction which should create no difficulty in the deliberations of the jury. For whether the insanity be total or partial, it is unsoundness of mind within the meaning of the statute. The distinction is more important in the application of the law of insanity to criminal cases. When a man is charged with a crime, and labours under total insanity, he is so clearly an irresponsible being, that the law does not consider him a fit subject for punishment, and he must be acquitted. Where he labours under an insane delusion in regard to a particular subject, (which is a case of *partial insanity*), the offence with which he is charged must have a connection with that subject, and must thus seem to have grown out of the delusion itself, or he will be convicted. It was considered unsafe to sanction a different principle in the administration of criminal justice. But in civil cases, where a person does an act or makes a contract, and labours under *partial insanity* at the time, it invalidates the act, though the act have no connection with the delusion which constitutes the *partial insanity*.

But the jury will not confine themselves to the inquiry whether

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unsoundness of mind exists; they will also inquire and determine whether it exists to such an extent as to disqualify the traverser from conducting himself with personal safety to himself or others, or from managing and disposing his own affairs; and by affairs is not meant merely his property, his estate, and business transactions. In the relation of father and husband, he is bound to protect and provide for his wife and children. The fact that a man may not as yet have squandered his property, is no security that he may not do it hereafter. The great object of the proceedings under a commission of lunacy, is to afford that security, and to protect those who look up to the traverser or his estate for protection and support. All the faculties of the mind may become disordered or alienated; they may not all be so at the same time or in the same degree. Some may remain in apparent full vigour, while the rest are diseased, or some may be affected in a greater and the rest in a less degree. It is hardly possible to express in words the nice distinctions that mark the boundaries of reason and insanity. However much may have been written on the subject as a matter of science, the common sense of mankind is the best guide in deciding the question of sanity or insanity when presented in a practical form; and it is justly asserted that its decision can receive no great degree of aid from metaphysical speculations.

1. A delusion upon particular subjects may be sufficient to authorize the jury to find the traverser of unsound mind. Whether the delusion be of such a character as to demand such a finding, is a question for the jury to determine. Where the delusion is a slight one and perfectly harmless, where there is no prospect or probability of it working harm or injury either to the traverser or his friends, in person or estate, a jury would not be likely to subject him to such a finding. Take the case of one whose personal vanity has grown into a delusion. He imagines his person the embodiment of beauty and symmetry. He spends hours in graceful attitudes before his glass. When he walks the streets he imagines everybody, and particularly the ladies, look upon him with admiration. The jury could scarcely perceive the necessity of interposing the law, or curtailing his innocent enjoyments by putting him in charge of a committee. But the case is very different where a man labours under a variety of delusions; where, without the least foundation for such a conceit, he fancies at one time a conspiracy to exist against his life amongst the hands and superintendents of the establishment where he is working; at another a conspiracy against him in the religious congregation of which he is a member; at another that all his own witnesses at the inquisition were whore-masters; at another that his family physician, a man of the highest character and reputation, has administered to him poisonous pills made of the womb of a dead woman; at another that money belonging to him

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remains concealed and buried in the earth; at another that his wife, a virtuous and good woman, is guilty of habitual prostitution and of incest with his own son. Delusions like these would justify a jury in pronouncing the patient of unsound mind, if they merely existed in the abstract and were not carried into practical operation. But when they are acted upon; when under these promptings he conceives a hatred for his long-tried and best friends; when he treats his neighbours with unnatural coldness and unfounded suspicion; when, as he passes from church, he thinks he hears his fellow-members whispering about him in words of detraction, pointing at him in scorn and derision, and saying that the very clothes on his back are unpaid for, while he is known to be a man perfectly independent in his circumstances; when he importunes a magistrate for a subpoena against a beautiful and accomplished young lady (to whom he probably never spoke in his life) in the expectation of compelling her to disclose the locality of the buried treasure; when he quarrels with his wife without cause or provocation, denouncing her for the interest she takes in the subject of the same religion which was once his own highest source of happiness; when he charges her, a lady of unexceptionable life and character, with adultery with numbers of the most moral and respectable citizens of the community; when he goes so far as to charge her to her face with a crime, the bare mention of which is painful to the feelings; when he not only makes such unfounded and shocking charges to her face, but spreads them abroad through the community, and attempts to found upon such alarming delusions a judicial proceeding against his own son and the mother that bore him; when his delusions break out in open violence, and he drives his wife, beaten and bleeding, from under the roof that should be her shelter, and at the same time raises his hand against his unoffending and worthy son; when he threatens to abandon his family, and expresses a desire to get hold of his estate in order to dispose of it, and thus raise the means of crossing the ocean; when he commits such outrages, and is guilty of such extravagant conduct, under the influence of unfounded permanent delusion, a more fit subject could not be found for a commission of lunacy.

The jury will then determine whether the traverser labours under unsoundness of mind, and whether such unsoundness is of such a character as to demand that the shield of the law should be thrown round himself, his family, his friends and his estate. If a man labour under a variety of delusions, when those delusions are entirely unfounded, when they are of a permanent character, when they lead to constant violations of the most sacred ties and duties on earth; when in their effects they come into daily and violent conflict with the rights and character of others, a jury would hesitate before they would pronounce such a man sane and capable of governing himself and managing his affairs.

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2. The jury will determine, with the aid of the views which have been expressed by the court, under what delusions the traverser labours, whether they amount to mental unsoundness, and if so, will determine from their character and effects whether he be a fit person to govern himself, with reference to the duties he owes to himself and others, and to manage his affairs.

4. In civil cases, it is not necessary that a person should be wholly deprived of understanding, in the literal meaning of the phrase, to make him incapable of making a binding contract. It is well settled that the existence of what is known in the law as partial insanity, invalidates the act of the party, (as we have already stated), even when that act has no connection with the particular delusion. It would take stronger evidence of insanity, however, to set aside, in a civil case, an act which has been attended with no injury to himself or his family, and where there has been no fraud or circumvention used, than it would to justify a jury in declaring him a lunatic.

5. We decline charging the jury in compliance with this point. It is for the jury first to determine whether he has been sane up to this time in his management and designs in regard to his property. Suppose he had been so, this in itself cannot exempt him from a charge of lunacy, if it be well established in other respects, nor is it any guaranty that he will continue so. A man may act with the utmost rationality and prudence for a time in regard to his estate, and yet be a proper subject for a commission of lunacy. As we have already stated, the jury are first to inquire, not whether the traverser is wholly deprived of intellect, not whether he has no mind at all, but whether his mind be sound or unsound. If they find him unsound in mind, then they will judge by the character of the unsoundness, its consequences and effects, whether it requires the traverser and his property to be placed in the guardianship of the law. But is the degree of prudence he manifests in regard to his property the only thing worthy of consideration in determining the question of his sanity? Has he no other duties to discharge than those which relate to the immediate care of his property? Have his wife and family no other interest than that which they have in the preservation of his property? Are they not entitled personally to his protection? and instead of protection shall they be visited with abuse and violence, with insult and injury? Have his neighbours no rights entitled to the protection of the law? Shall their character be subject to his detraction? Let the law once pronounce him sane and responsible for his words and actions, and his property may be swept away by damages in actions of slander. Shall the most moral and worthy members of society be implicated without the slightest foundation, day after day, in charges of the most destructive character? Shall such a man, thus unfortunately lost to every sense of duty towards himself, his family and his neighbours, be con-

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sidered capable of governing himself, or managing properly his affairs?

The counsel of the traverser excepted to the charge, and assigned for error the answers to the points submitted by them.

Mahon and *Lowry*, for plaintiff in error, cited 2 *Law Lib.* 6; 1 *Whart.* 52; 2 *Kent* 451; 2 *Johns. Ch.* 237; 4 *Cow.* 218; 12 *Petersdorf* 275, 390; *Cooper's Med. Jur.* 324; 1 *Phillips* 375; *Rey's Med. Jur.* 446; 4 *Rawle* 234; 12 *Petersdorf* 379.

Black and *Loomis*, contra, cited 1 *Whart.* 52; *Purd.* 722, sec. 67.

The opinion of the Court was delivered by

HUSTON, J.—There are cases in which deliberate opinions of great lawyers, or even the *dicta* of such men, seem to impose a restraint to investigation on certain subjects; and if these have been often cited as authority down to near our own time, the difficulty to be surmounted appears greater. Lord COKE, from his situation in life, had probably little intercourse with what occurs often to those who mingle much in society, and possibly, I may say probably, had never seen or never examined an idiot lunatic, or one *non compos mentis*, in his life; and though no doubt treatises on those subjects existed, we do not know what they were. We know much has been written on mental insanity; that the subject has employed the most eminent physicians, jurists and philosophers; that we have theories and the histories of those disorders of the mind by those who have had opportunities of observing the subjects of such disorders for many years; yet we find no treatise of the age in which Sir Edward COKE lived, quoted or even noticed.

On all subjects relating to rights of property, I admit his authority; but the subject before us is not the rights of idiots, lunatics, or of persons of unsound mind: it is his definition of what disordered state of the faculties constituted a person designated by those words; a matter more of medical than judicial cognizance. He says, "An idiot or fool natural, is one who from his nativity, by a perpetual infirmity, is *non compos mentis*." Certainly it was not intended to leave this as a definition of idiocy. Another ancient and great authority, Fitzherbert, defines an idiot to be "one who from his birth cannot count or number twenty pence, or tell who his father or mother is, or how old he is;" "if he have sufficient understanding to know and understand his letters, or to read by teaching and information of another man, then he is not an idiot." Of this Lord TENTERDEN has said, "It is contrary to common sense; for as to knowing the letters of the alphabet, or reading what is set before him, a child of three years old may do that." 2. A person who was of good and sound memory, and by sickness, grief or other accident, wholly loses his

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memory and understanding. 3. A lunatic, *lunaticus*, who sometimes has understanding and sometimes not, *qui gaudet lucidis intervallis*, and therefore is called *non compos mentis* so long as he has not understanding. The words "wholly lost his memory and understanding," and the expression attributed to Lord HARDWICKE in 3 Atk. 173, being *non compos mentis*, of unsound mind, are certain terms in law, and import a *total deprivation of sense*; and these expressions, adopted by Judge KENNEDY in delivering the opinion of this court in quashing the inquisition in *Beaumont's case* (1 Wharton 55), were quoted and relied on by the counsel of the traverser in this case. Although Atkyns is an elegant and generally a correct reporter, yet it must be recollected that in his day the Chancellor did not write his own opinions and give them to the reporter, and that the expression may not have been used by the Chancellor. But if it was used, it proves little. The words "of unsound mind" had been used in the returns on inquests, and were omitted in that case; and for this cause the inquisition was quashed, and that weakness of understanding, as expressed, was not equivalent, was decided. The words *non compos mentis*, or unsound mind, were held necessary in point of form, and nothing more: for in the same book (page 184) we find an inquisition on the same person, stated to have been found on the same evidence, but in form stating Barnsley to be of unsound mind and incapable of managing his estate, was affirmed. And more: the same Lord HARDWICKE refused to allow it to be traversed, because two inquests had found the same way; for, said he, although the first was quashed for want of form, it was substantially the same finding.

It has happened that the argument of counsel adopted by the court, and carrying conviction in itself, is quoted as law. In the defence of Hatfield, Mr. Erskine, speaking of the total deprivation of memory and understanding, as put by Lord COKE, says: "If this was intended to be taken in the literal sense of the words; if it was meant that to protect a man from punishment he must be in such a state of prostrated intellect as not to know his name, nor his relation towards others; that if a husband, he should not know he was married; if a father, that he should not know his children; nor know the road to his own house nor his property in it; then no such madness ever existed in the world. It is idiocy alone, which places a man in such a helpless condition." He afterwards admits that in delirium a person may not be able to know any person or thing. "In all the cases which have filled Westminster Hall with the most complicated considerations, the lunatics and other insane persons who have been the subject of them, have not only had memory in my sense of the expression—they have not only had the most perfect knowledge and recollection of all the relations they stood in towards others, and of the acts and circumstances of their lives, but have in general been

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remarkable for subtlety and acuteness. Defects in their reasonings have seldom been traceable. The disease consisted in the delusive sources of thought; all their deductions within the scope of the malady being founded on the *immovable assumption* of matters as realities, either without any foundation whatever, or so distorted and disfigured by fancy as to be nearly the same thing as their creation." He then related a case tried in that very house before one of the judges then present, of an indictment by an insane person of his own brother and the keeper of an hospital, for false imprisonment. Mr. Erskine had not been informed as to the nature of the insanity; and after the witness had detailed his story, cross-examined him for more than an hour, and left no means untried which his knowledge or his experience could suggest; and when the jury and judge and audience were satisfied that it was a most flagrant case of oppression and injustice, Dr. Syms, who had attended the patient, came in and stated to the counsel the nature of the malady, on which Erskine, with great apparent humility, begged forgiveness for his rudeness, as he had not known the witness. Immediately the insane replied, with great gravity, "I forgive you—I am the Christ;" and the trial ended.

Most of the judges on this bench knew a member of the bar of considerable legal acquirements, and those rather solid and substantial than showy or superficial. For some considerable time those near him saw a change, but it did not attract general attention; he attended to his property and profession carefully and constantly, and no want of skill or knowledge was discovered. At length his abuse in words of his wife and friends raised doubts as to his sanity; his increasing violence and threats and attempts removed all doubt, and his friends took him to the Pennsylvania Hospital. When there he became quiet and apparently composed. He insisted on his sanity, had the managers and physicians called together, and after many examinations and consultations was discharged as of sound mind. It was soon discovered that he was still deranged. He however took great care of his property. At length he charged one and another with robbing him. His insanity became dangerous, and strict confinement absolutely necessary, and he continued in that state, or growing worse, till he died. So far from having lost all memory and power of understanding, perhaps both memory and reasoning power were increased. I personally knew another person, a farmer, of good character and understanding. His insanity first showed itself by groundless charges of attempts to kill him by his wife and children. He went armed, slept with arms near him and in his bed; then threatened them and some neighbours. He was taken also to the same hospital. At length he demanded his liberty; sent for a most respectable gentleman in the city, who, having property near where he lived, knew him, and had heard of his insanity and the

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nature of it. I do not know the particulars, but he acknowledged he had been wrong and violent, and after several examinations was discharged as of sound mind. Yet, alas, it was a sad mistake; he continued deranged. The objects of his delusion changed; his habits and manners and appearance changed; his conversation, especially on his profession of a farmer, was sensible and instructive, and he could relate distinctly his practice and the results for years. He never showed much of the tiger, but much cunning. He at length rambled often, or rather travelled on a good horse, from home; sometimes stayed a week at a place; always paid his bill; but would, when he became intimate with any person, show his concealed weapons and give obscure hints. At length he sunk into fatuity and died.

All treatises on insanity and most reports of trials relating to insane persons, show that a total loss of reason and memory is unknown to courts and physicians, unless in cases of delirium from disease or absolute frenzy; and yet commissions of unsound mind are constantly found, and deeds and wills avoided for insanity. Lord HALE, so far as I know, was the first judge who said and wrote, "There may be a partial insanity of mind, and a total insanity. The former is either in respect to things *quoad hoc vel illud insanire*, to be mad as to this or that subject. Some persons that have a competent use of reason in respect to some subjects, are yet under a particular dementia in respect to some particular discourses, subjects or applications." Now we find that the nature and cause and cure of insanity have in a much greater degree engaged the attention of the benevolent and learned, both in the medical and juridical departments; and if the unbroken current of opinion of both physicians and courts, for more than half a century, has been, that a person is deranged, is *non compos mentis*, or of unsound mind, though not *totally* deprived of memory and understanding, but is only partially so deprived or on particular subjects, it would be strange if we should reject and disregard all the lights of science and experience, and all the current and weight of judicial decision in ecclesiastical, civil and criminal courts, from the time of Lord HALE to the present day, and all this from a reverence for COKE and FITZHERBERT, on a matter rather medical than legal or judicial.

To give a definition of insanity is admitted to have been found impracticable: and so also to give a description of the different kinds of insanity; because the several varieties pass into each other more imperceptibly and more frequently than insanity changes into healthy and sound mind. But all writers and jurists agree, that an immovable delusion as to facts past or present is not merely a symptom of insanity, but is in fact insanity or the effect of an unsoundness of mind. A man may have many absurd and unfounded opinions and belief as to matters and facts which never existed and do not now exist, but reason and demon-

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stration and examination as to the present existence and state of visible and tangible substances, will correct these opinions and belief in a sane mind—but not so if the mind is deranged. The false impression is proof equally against the strongest reasoning, the clearest proof, and against actual inspection. The unhappy being will rather believe that his eye or his touch deceives him as to objects before him, than that his illusion is any thing but reality, and this while on every other subject you cannot discover any thing amiss in his faculties.

I knew a man of more than ordinary strength of mind, of information, of the strictest integrity, and so far as man could judge, devoutly and steadily and for many years religious. In the wilderness, with a surveying party, he was attacked by an intermittent fever. There was no physician and none of the comforts to be had in a well-furnished house with a wife and family. His disorder changed to a regular ague, with distinct intermissions and chills and fever, and he set out very feeble for home on horseback. There was for a long distance from him neither carriage nor carriage road, and the houses were cabins and not very near to each other. On his way home, in more than one case, he had no house for twelve or more miles. He reached home exhausted by a journey of several days. The care of his family and attendance of an excellent physician soon removed his fever, but he was seized with the idea that his property was all gone, that he was involved in debt, &c. &c. As soon as I heard of this I went to his house, and was constantly with him for some days. He would converse as usual for hours, but a slight cause, or no cause discernible by me, brought on a recurrence of the dreadful illusion. I knew his property in general, and I knew that he kept a regular account of his receipts and expenditures. I had recourse to his books. The accounts of every hireling, male and female, were settled to within a short period. His bank book showed a large balance in his favour; and a sum advanced to a storekeeper a few months previous, was not taken up by his orders and the purchases of his family. I took off the balances on a sheet of paper, and at the same time he did the same on another sheet. Our additions and subtractions agreed, and showed a balance in bank, after paying every debt, of more than \$1000. While I was putting away the books he was walking about the room. A friend came into the house, and to my astonishment and horror he told that person I had been endeavoring to impose on him by showing false books and a false abstract from them. Now every letter and figure in those books was written by himself, and his abstract and mine agreed exactly. Within a week, notwithstanding the utmost care and watchfulness of his friends, he was buried. I have referred to this melancholy case as another instance of the unconquerable nature of the false perception or delusion under which the unhappy subjects labour; and for another reason; have not

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medical men and others relied too much, or looked too much, to injuries to the head? Did not this case commence with the want of the comforts and attention to which he had been accustomed, increased by his great debility? Though not directly in point of time connected with the delirium which often occurs during the fever or a severe fit of ague, yet may it not have been the consequence of it? May not the want of every thing he had been accustomed to, have started his peculiar insanity?

We have now so many treatises on insanity, its causes, its nature, the evidence of its existence, &c., by medical men, treatises in which the law on the subject has been collected and digested, that I shall not copy from what is in every good law library; and I have no theory of my own to advance; nor shall I enter into the question whether, under our own Act of Assembly of 1836, the courts have power to interfere in cases of great imbecility of mind, though that delusion, which is either the cause or the effect, and certainly is the concomitant of most cases of insanity, does not exist. It is admitted by the counsel on both sides, that the statement of the facts testified to as proofs of insanity is correct and not exaggerated. I shall here insert that part of the charge and the answers to the points proposed by the counsel, and the concluding remarks of this learned and able charge, and merely say there was no error and that the judgment is affirmed.

Judgment affirmed.

Tassey *against* Church.

A judgment obtained by one firm against another, each of which is constituted in part of the same members, some of them being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm.

ERROR to the District Court of *Allegheny* county.

This was an action brought by Samuel Church, James T. M'Vay and Franklin Gordon, trading in the name of Church, M'Vay & Gordon, against John Tassey and Samuel Church, trading in the name of Tassey & Church. The plaintiffs declared for money had and received, &c., and an account stated. A verdict and judgment were rendered against the defendants for \$13,013.76.

The defendant, John Tassey, sued out a writ of error to September term 1842, and the Supreme Court affirmed the judgment. He then filed his bill on the Chancery side of the District Court

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of Allegheny county, alleging Church's indebtedness to Tassey & Church, and M'Vay and Gordon's indebtedness to Church, to a much larger amount than the sum of the judgment and costs in the suit at law, and praying an account and injunction. The argument on the jurisdiction of the court came up on exceptions to the answers for insufficiency, the court and counsel preferring to discuss the question of jurisdiction and relief as if on demurrer to the bill.

GRIER, President, delivered an opinion sustaining the jurisdiction of the court, and directing more full answers to the bill. Afterwards, on the law side of the court, the plaintiffs in the judgment issued a *fi. fa.* The sheriff returned *nulla bona* as to the joint property of Tassey & Church, and a levy on the personal property of Tassey as per schedule. Tassey moved the court to set aside the levy, for the reason that Samuel Church, one of the plaintiffs, was the same Samuel Church, one of the defendants, (which fact was admitted), and hence the judgment on which the execution issued, if valid at all against the defendants, was only so against the partnership effects of the late firm of Tassey & Church, and could not be made off the individual property of John Tassey.

The court below set aside the levy, and this was the subject of the error assigned.

Loomis and Biddle, for the plaintiffs in error, cited *Gow on Part.* 222; 17 *Serg. & Rawle* 456; 6 *Vez.* 119; *Story on Part.* 345; 6 *Whart.* 540; 4 *Watts & Serg.* 141; 2 *Bos. & Pul.* 120; 1 *Binn.* 123; 3 *Serg. & Rawle* 579; 11 *Serg. & Rawle* 47; 11 *Vez.* 413; 4 *Har. Dig.* 2349; 2 *Watts & Serg.* 361; 4 *Watts* 430; 7 *Cow.* 223; 4 *Johns. Chan.* 14; 3 *Mason* 145; 10 *Watts* 333; 2 *Rawle* 402.

Dunlop, contra, cited 8 *Serg. & Rawle* 30; 6 *Taunt.* 605; 5 *Wheat.* 112; *Co. Lit.* 264, n. 1; 1 *Bos. & Pul.* 630; 5 *Whart.* 568; 1 *Rawle* 368; 7 *Serg. & Rawle* 488; 3 *Watts & Serg.* 91; 17 *Serg. & Rawle* 311.

The opinion of the Court was delivered by

GIBSON, C. J.—The argument at the bar has taken a wider range than the point before us, which involves no more than the levy of the execution on the separate estate of Tassey, one of the defendants and a partner of the debtor firm. The bill on the equity side of the court is no part of the record; and though it is spread on the paper book, it is to have no influence on the question raised by the assignment of error, further than the facts charged may illustrate the injustice and inconvenience of the method attempted in this instance to carry out the remedy, as it is called, provided by the statute, which allows an action to be sustained between distinct firms constituted in part of the same members, some of them standing on both sides of the record as both plaintiff

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and defendant. The statute was enacted, it is said, to provide for a particular case. It certainly went through the legislature without much consideration of its effect, or the difficulties that would be found to lie in the way of its execution; and it shows how inevitably the administration of justice is plunged into disorder by legislative tampering with its machinery. The action authorized by the statute may readily be conducted to judgment; but how it could be thought that a writ of execution might be applied to the persons or the separate estate of the individuals who compose the debtor firm, without doing injustice to some of them, or producing some whimsical absurdity, it would require all the ingenuity of the person who framed the act to explain. It was enacted before the abolition of imprisonment for debt; and to have allowed the judgment authorized by it the full common law effect, would have subjected one of the defendants to arrest on his own execution, but still with the means of regaining his liberty by ordering, in his capacity of plaintiff, his body to be set at large in its capacity of defendant: an operation that would have discharged the debt. Yet a writ of *capias ad satisfaciendum* could have been issued only against both; and the sheriff would have been as much bound by it to arrest the one as the other. And the same absurdity would appear in the seizure of the separate estate of a party plaintiff in satisfaction of his own execution. It might be avoided, indeed, by directing the sheriff to seize the property of the other defendant; which, though it would be less absurd, would be more unjust. Say that only a moiety of the debt shall be thus levied, and you mitigate the injury, but do not prevent it; for the ultimate justice of the case would depend not on the apparent duty of equal contribution in the first instance, but on the balance of the partnership accounts, which a court of law is incompetent to ascertain; and if the co-defendant were insolvent, as Church is alleged to be, an action or bill against him for contribution would be of little use. It may be said that as a partner's separate estate is liable at law for the joint debts in an action by a stranger, the misfortune of being compelled by the insolvency of his co-partner to bear the whole burthen, was sometimes felt before the statute in question was enacted. But the solvent partner would not be bound in equity to pay the part of the money which would be coming to the insolvent partner himself; and he would not be bound to pay any part of it whatever, if, as charged in Tassey's bill as to Church, his co-defendant owed him a sum equal to the amount of the judgment, and were a creditor of the plaintiff firm to the same amount.

What effect, then, must we give to such a judgment? Its office is obviously to settle the general question of indebtedness between firm and firm, and it was doubtless intended to be followed by execution; but when we subject the joint effects to seizure, we do perhaps all that was contemplated. That the action was con-

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sidered as a proceeding between firms as independent bodies having an existence distinct from the individuals who compose them, seems clear; for the solecism of an action brought by a man against himself for purposes of self-execution, could scarce have been entertained by the legislature. The Roman law and the codes that have sprung from it, treat a firm as a *quasi* corporation, and allow it to sustain the relations of debtor and creditor with the individuals who compose it, as well as to sue them and be sued by them; and why may we not carry the principle the same length, by holding that where a judgment is between firm and firm, and not between man and man, the joint property of the debtor firm, like the property of a corporation, is alone liable to execution? It is true the Roman law does not thus dispose of the difficulty; and I am sorry that we are hindered by the stiffness of common law forms from choosing the course pointed out by it; for it is impossible to satisfy the wants of justice between partners by any management of an execution, or indeed by any common law process whatever. The crude and unwieldy action of account render has been so long disused that it is imperfectly understood; and the attempt of our legislature to adapt it to modern use has not made it much better. Happily the chancery powers which have been vested in the judiciary will make the statute before us a dead letter, where there are not joint effects; and where it happens, as it sometimes must, that execution even of the partnership property would work injustice between defendants in circumstances like the present, the partner jeopardied will arrest it by a bill for an injunction and a settlement of the accounts.

Our decision of the point before us is of little importance to the present parties; for were we to restore the execution to its activity, the District Court would be bound to suspend it by such an injunction. The facts charged by the bill in that court would demand it; for if Church is insolvent, and not only indebted to his co-defendant but a creditor of his co-plaintiff, it would be inequitable to let the execution go on. I say this not to forestall the opinion of the able court which has the matter in charge, but to show the injustice of letting the money be recovered of one of the partners at law. The act might as well be expunged from the statute book, since such matters must eventually find their way into equity. We are of opinion, therefore, that the levy was properly set aside; and that Tassey's separate property cannot be seized till the accounts are taken and the equities settled between the defendants.

Order setting aside the levy affirmed.

Boggs against Varner.

In an action of ejectment, where the defendant claims against a prior and unrecorded title, he may give evidence of valuable improvements made upon the land before notice of the plaintiff's title, in order to entitle him to the character of a *bonâ fide* purchaser for a valuable consideration.

A recital in a deed is evidence of notice to the purchaser of the fact recited, and he will be affected by it so far as it concerns the title to the land purchased; but it will not affect him with notice in regard to the title of any other land than that which is conveyed by it.

The title of a *bonâ fide* purchaser for a valuable consideration is not to be affected by loose, vague and uncertain evidence of the existence of a prior title. If a former owner neglects to record his title, every presumption is to be made in favour of a subsequent purchaser.

ERROR to the District Court of *Allegheny* county.

Wm. L. Boggs and others, heirs of Wm. Boggs, deceased, against James Varner and others. This was an action of ejectment for part of a lot of ground in the city of Pittsburgh. The plaintiffs deduced their title from John Irwin, under whom the defendant also claimed. John Irwin conveyed to John Boggs, reserving a ground rent of \$50 a year. John Boggs sold by a parol sale for \$500, to William Boggs, the plaintiffs' ancestor, who entered into and continued his possession until 1822, when he went down the Ohio, taking his family with him, but leaving the house and some of his furniture in the care and custody of his sister, intending to return, but he did not. The sister rented the property to a man named Steel, who continued to occupy it until the house and furniture were consumed by fire in 1825.

The defendants, also claiming under John Irwin, gave in evidence a deed from him to James Brown and James Varner, dated 6th September, 1828, for the consideration of \$1747, recorded on the day of its date, and a deed from James Brown to James Varner, one of the defendants.

The defendants took the ground that although the plaintiffs' title was originally good, they were not entitled to recover, because the deed from John Irwin to John Boggs not having been placed on record, and the sale from him to William Boggs being by parol, and there being no one in actual possession at the time they purchased, they stood in the situation of *bonâ fide* purchasers for a valuable consideration without notice of the prior title.

The plaintiffs, for the purpose of proving notice of their title to the defendant, offered in evidence the record of a deed from John Irwin to Andrew Scott, for another part of the same lot, which recited, "*Thence by ground demised to John Boggs,*" and the record of a deed from Andrew Scott to James Varner for the same part,

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dated 15th Sept. 1821; and in connection with this they offered a deed from James Brown to James Varner, for part of the same lot. These last two deeds were offered for the purpose of showing notice or knowledge in the defendants of the deed to John Boggs. This evidence was objected to by the defendants.

GRIER, (President). A recital in defendants' title papers to a different piece of property, is no notice as regards that in dispute. If the plaintiffs intend to rely on a knowledge which is to conclude the purchaser because he had acted fraudulently, it must be done directly, and not by loose, vague and strained inferences. If the plaintiffs can give any direct evidence of knowledge, it will be received; but we cannot commit testimony to the imaginations of a jury, to affect a man with knowledge from circumstances from which it is no necessary inference.

The plaintiffs excepted to this opinion. The defendants offered evidence of the value of the improvements made by them on the lot in controversy since their purchase, for the purpose of showing themselves to be purchasers for value. The plaintiffs objected, but the court overruled the objection, and sealed a bill of exceptions.

The plaintiffs, as rebutting evidence, offered in connection as follows:

1. A continued possession of the Boggs's up to December 1825.
2. That James Varner during all this period lived on part of what was originally the same lot, and was in habits of daily intercourse with the family of the Boggs's.
3. The notoriety of the title of the Boggs's by everybody in the neighbourhood.
4. And again, the deed from Andrew Scott to James Brown, and from Brown to Varner. And this all for the purpose of showing the defendants' knowledge of the plaintiffs' title.

The court overruled the offer and sealed a bill of exception at the request of the plaintiffs.

The court directed a verdict for the defendants.

Hamilton, for plaintiff in error, as to the rejection of the evidence of the deed which contained the recital, cited 10 *Serg. & Rawle* 73; 6 *Serg. & Rawle* 134; 1 *Pr. Wms.* 804; 17 *Johns.* 335; 7 *Cranch* 171; 15 *Johns.* 167; 14 *Johns.* 404; 3 *Binn.* 179; 4 *Binn.* 146; 1 *Whart.* 318; 1 *Atk.* 489; 2 *Freem.* 127-137; 4 *Whart.* 259. As to the admission of the evidence of the improvements made on the lot by defendants, 1 *Vez.* 128; 4 *Yeates* 95; 10 *Serg. & Rawle* 333; 3 *Watts* 238. And as to notice of the plaintiff's title, 2 *Yeates* 211; 1 *Ld. Raym.* 311; 8 *Johns.* 227; 10 *Watts* 195.

McCandless, for defendant in error, on the first bill, cited *Sug. on Vend.* 322; 1 *Johns. Chan.* 574; 2 *Sch. & Lef.* 315; 3 *Mad. Rep.* 26; 2 *Watts* 78; 7 *Watts* 382; 4 *Whart.* 259; 5 *Binn.* 129;

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10 *Watts* 412. On the subject of the equity arising from the improvements made by defendants, 4 *Watts & Serg.* 20 ; 3 *Watts* 239.

The opinion of the Court was delivered by

ROGERS, J.—The plaintiffs, who are the children and heirs of William Boggs, deduce their title from John Irwin, who, it is conceded, was at one time the owner of the property. Irwin conveyed to John Boggs a fee simple, reserving a ground rent of \$50 a year. John Boggs sold the lot to his brother William Boggs by a parol sale for five or six hundred dollars, and William Boggs, in pursuance of the contract, entered into possession of the premises and continued in possession until the spring of the year 1822, when he went down the river, taking his family with him, but leaving the house and some of his furniture in the care and custody of his sister. It was intended as a temporary absence merely, as his purpose was to return, which he was prevented from doing by an accident which happened to one of his family. The sister rented the property to a man named Steel, who continued to occupy it until the house and furniture were consumed by fire in December 1825. These facts seem to be established by the evidence, and if there was nothing else in the case, the jury would have committed no error in returning a verdict for the plaintiffs.

But the defendants put the case on other and different grounds. They urge that even on the concession that the plaintiffs' title was originally good, still they cannot recover, because the deed from Irwin to John Boggs not having been placed on record, and the sale from him to William Boggs being by parol, and there being no person in the actual possession at the time they made their purchase, they stand in the situation of a *bonâ fide* purchaser for a valuable consideration without notice of the prior existing title. These were the turning points of the cause, to which all others are subordinate. The questions divide themselves into two points. 1. Were the defendants purchasers for a valuable consideration? and 2. Were they purchasers without notice of the plaintiffs' title? On the first point the burthen of the proof is thrown upon the defendants, but on the second, on the circumstances of this case, it is shifted to the plaintiffs.

The defendants, after giving in evidence a deed from John Irwin and wife to James Brown and James Varner for a consideration of \$1747 expressed in the deed, and a deed for the same property from James Brown and wife to James Varner for the consideration of \$2500, offered to show that improvements were made on the property since the purchase, and the value thereof. The evidence was received on the point of consideration, and for this purpose we think it was competent. That the defendants were purchasers for a valuable consideration seems hardly to have been questioned. The deeds express the consideration on their

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face, and as between Irwin and his vendees full value was actually paid, and therefore, even if the court had made a slip on this point, we should feel very reluctant to reverse the cause, as the plaintiffs have sustained no injury. But is such evidence competent to show that the defendants were purchasers for a valuable consideration? It has been ruled that until actual payment a subsequent vendee is not entitled to protection in a court of equity. Now suppose the purchase money is unpaid, would it not be competent for the defendants notwithstanding to protect themselves by proof that, relying on his title acquired in good faith, they had, before they knew of any adverse claim, expended large sums of money in the erection of valuable improvements upon the premises? Unless they could defend their possession by such testimony, the defendants would suffer great wrong. The plaintiffs, by whose fault in neglecting to comply with the plain directions of an act he has been induced to expend his money, would be suffered to recover the land and the improvements also. This would be contrary to every principle which governs a court of equity. It puts money into the pockets of the negligent at the expense of the innocent purchaser. If the vendee was ignorant of the prior title at the time he made his purchase, any expenditures before he has notice of the former title is competent testimony, because its effect is to put him in the attitude of a *bonâ fide* purchaser for a valuable consideration.

But if on the other hand improvements are made after notice, a different case is presented. The subsequent vendee acquires no equity, because it is his own folly to expend money under such circumstances, and it is not just that he should be permitted to improve the owner out of his title. The subsequent purchaser can only acquire an equity in good faith without knowledge of the former title either constructive or express. But the plaintiffs meet this equity of the defendants by allegation of notice, constructive and actual, at the time of the sale. And to sustain these positions the plaintiffs offered the testimony contained in the several bills of exception. It has been already remarked that the first purchaser having neglected to record the deed from Irwin to Boggs, the *onus* of the proof of notice to the subsequent purchaser is thrown upon the plaintiffs. The presumption always is that the subsequent vendee purchases with good faith. And the evidence of notice should be of such a nature as to convince every reasonable and dispassionate mind that the subsequent vendee knew of the existence of the prior and superior title, or that he ought to have known, inasmuch as there was enough known to him to put him on inquiry, which the law deems equivalent to actual notice.

It is urged, and to this point the plaintiffs' evidence is principally directed, that one of the defendants, Varner, had actual knowledge that the property in dispute was owned by William Boggs, the purchaser from John Boggs, at the time of his purchase

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from Irwin. On both heads evidence was offered to the jury. After giving in evidence the record of a deed from John Irwin to Andrew Scott, which recites "Thence by ground demised to John Boggs," the plaintiffs offered the record of a deed from Andrew Scott to James Varner for the same lots. The deeds were offered to show notice of the recital in the deed to John Boggs. The deed to James Brown also contains the same recital, but the deed from Brown to Varner, though conveying the same property and reciting the same deed, does not contain the recital in its description. But in this circumstance I put no faith, as the deed is referred to, on which the plaintiffs rely to fix the defendants with notice of their title. Notice of a deed is notice of its whole contents, so far as they affect the transaction in which notice of the deed is acquired. 2 *Sch. & Lef.* 315. The recital on which the plaintiffs rely, it must be conceded, is vague and indefinite. "Thence by grounds demised to John Boggs," are the words of the recital; but when it was demised, by whom demised, or how it was demised, whether for a term of years, which would be its natural import, or what in common parlance is called a perpetual lease reserving rent, nowhere appears.

These considerations would be entitled to some weight if the case needed it; but I do not put it on that ground, but think the testimony objectionable for the reason assigned by the court, that it is a recital in title papers to a different piece of property. The evidence would lead to dangerous consequences, for it is impossible for any one to recollect all the recitals in deeds under which he may claim. Let this be held to be admissible and competent to affect a subsequent purchaser with notice, it will follow that no man can safely purchase until a most careful examination and inspection of every deed to which he may be a party, and under which he claims. This has never been so held, but principles the reverse of this have been repeatedly ruled. Thus, notice to an agent to bind his principal must be in the same transaction. 3 *Mad. R.* 28. The purchaser is not bound to carry in his recollection those parts of a deed which have no relation to the particular purchase he was then about to make, nor to take notice of more of the deed than affected his then purchase. *Sug. Vend.* 322, Edit. of 1836; and which is in point. Notice to a purchaser in one transaction will not affect him in another subsequent one. 2 *Sch. & Lef.* 315.

The plaintiffs also offered in evidence a continued undisturbed possession by the Boggs's until Dec. 1825; that James Varner, during all this period, lived on part of lot No. 108, and was in habits of daily intercourse with the family; the notoriety of possession of the Boggs's in the neighbourhood, and in connection therewith, the deed from Scott to James Brown, and the deed from Brown to Varner. Having already disposed of the last part of the proposition, it is enough to observe that we see nothing in the fact

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that it is offered in connection with other testimony that varies the question. If inadmissible before, it is objectionable still. We cannot understand how the defendants can be affected by what may appear in a previous transaction, which it is altogether probable they may have forgotten, even if they ever adverted to it at all.

It must be remembered that at the time of the purchase in 1828, no person was in possession, and that the property had been vacant from the time of the fire in 1825, a period of three years. Had any person been living on the property when it was bought by Varner, it is conceded it would be notice to the purchaser; for where there is a clear unequivocal possession, it is constructive and legal notice, because it puts the purchaser on inquiry. 2 *Watts* 275. But to whom must the vendee resort for information of the title? Undoubtedly to the person in possession when the bargain is made; for if the possession is vacant, it supersedes the necessity of further inquiry, for no case has yet been ruled which extends the doctrine of constructive notice so far as to visit him with all the consequences of notice, because he may have known a person to have been in possession at any distant period of time before his contract. The law is not so unreasonable, and upon this point we do not wish to extend it further.

The other parts of the offer were also properly overruled. There is no case where a jury has been permitted to infer the fact of notice merely because the purchaser lived on the adjoining lot to the owner, or was intimate with him, or because it was notorious in the neighborhood that he was the owner. The evidence is too general, uncertain and indefinite to destroy a title for which a valuable consideration has been paid by the buyer. The recording acts were specially intended for the protection of purchasers, and they would be of problematical benefit if a jury were allowed to act or draw inferences to his prejudice on such loose unsatisfactory testimony. The provisions of the Act may be easily complied with and at but little expense, so that owners are left without excuse, and if they will neglect their duty in this particular, it is but just that the consequences be visited on their own heads. A court of equity acts on the conscience; and as it is impossible to make any demand on the conscience of a man who has purchased for a valuable consideration, *bonâ fide* and without notice of any claim on the estate, such a man is entitled to the peculiar favour of a court of equity. As every presumption is in favour of the subsequent purchaser, when the former owner is guilty of neglect, his title cannot be postponed except by evidence which taints his conduct with fraud. And this, it is obvious, ought not to be done by testimony in its nature vague and indefinite, and leading to no certain results, such as that he ought to have known of the prior title because he lived near the owner, in the same town perhaps or on the next lot, that he was well ac-

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quainted with him, or because the title was well known to others. This may all be true, and yet at the time he pays his money he may be ignorant of any other title than his own. It is not just that inferences should be strained in favour of the person by whose default the mischief has been done. We think the court was right in rejecting the evidence, because, admitting the truth of it, no legitimate conclusion adverse to the purchaser can be drawn from it. When you seek to act on the conscience of the purchaser, it must be by evidence direct and certain, not vague and indeterminate.

The court instructed the jury that if they believed the defendants were purchasers for a valuable consideration without notice, they should find a verdict for the defendants. That the testimony offered to show notice being excluded, it was the duty of the jury to find a verdict for the defendants, as the fact that they were purchasers for a valuable consideration was not contested. In this instruction we perceive no error. As there is nothing else in the case which requires special notice, we are of opinion the defendants are entitled to judgment.

Judgment affirmed.

Dunn against Ralyea.

It is essential to the validity of a sale of unseated land for taxes, that it should be so designated in the assessment as to lead the owner to a knowledge of the fact that it is his land which is assessed.

The number of a tract of donation land marked upon the ground, is the best evidence of designation, and must prevail where it differs from all others.

ERROR to the District Court of *Mercer* county.

This was an action of ejectment by Thomas Dunn against Henry Ralyea, to recover 200 acres of land, being tract number 1031, in the 5th donation district.

The plaintiff gave in evidence a patent from the Commonwealth, dated 17th July 1789, for lot No. 1031, of 200 acres in the 5th donation district, and sundry mesne conveyances by which the title became vested in him.

The defendant gave in evidence a connected draft of the 5th donation district, in which the land in dispute was designated as tract No. 1029, and as such assessed with taxes for the years 1809 to 1817 inclusive, and on the 3d Nov. 1818, sold by the treasurer and purchased by the commissioners, who in 1823 sold the same to Hugh Moore and Hugh Evans, under whom the defendant claimed. The jury found the following special verdict:

56 P. L. R. 35

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"We find this tract, No. 1031, is the land in controversy; that it was assessed as No. 1029 in 1816—1817, with county taxes. That in the commissioners' office there was a certified draft of the 5th donation district at the time, and had been since 1804, which represented the tract in dispute as 1029, from which the commissioners annually made out the duplicates for the assessors. That it was taxed in the name of Jacob Herrington, who had, it appears, once received an acknowledgment of a treasurer's deed for it, and which gave rise to the change in the assessment from the name of John Pearson to Jacob Herrington. That two of the supervisors of French Creek township for 1816, laid the road tax of 1816 on the tract in controversy. That it was sold as 1029, and by this number, for the taxes of 1816 and 1817, on the 3d Nov. 1818, to the commissioners of Mercer county, for the taxes and costs, being \$12.92, and a deed executed by the treasurer dated 3d Nov. 1818, and acknowledged 13th Nov. 1819, and was afterwards regularly sold by the commissioners of the said county to Hugh Moore and Hugh Evans, for \$41, on the 22d Nov. 1823. That this title was regularly vested in John Sheakley, under whom defendant takes defence. We further find that 1029 is on the ground located two tracts north of this, and has been seated since 1804, and that John Pearson brought suit for it on the 7th August 1816. If the court are of opinion that the plaintiff is entitled to recover, notwithstanding this treasurer's title, and by reason of the assessment being made as 1029, when the real number on the ground is 1031, then we find for the plaintiff; but if the court be of opinion that the sale is valid for the facts offered, then we find for defendant."

The court below rendered a judgment for the defendant.

Stuart and Pearson, for the plaintiff in error, argued that the error in the assessment was fatal to the defendant's title: that a designation of the tract, such as would lead the owner of the land to the knowledge of the fact that it was his land which was assessed, was essential to the validity of a treasurer's sale of unseated land; and cited 5 *Rawle* 348; 13 *Serg. & Rawle* 306; 4 *Watts* 263; 3 *Watts* 238; *Act of 1834, Purd. 206, sec. 26, 7, 8.*

Foster, with whom was *Sullivan*, for the defendant in error.

So far as regards the deed from the commissioners to Moore and Evans, it is enough to say that the Act of Assembly does not require the use of the county seal. The commissioners are a corporation, and the execution and delivery of the deed was valid, although not done by the same persons who made the sale.

The sale by the treasurer to the county was evidence of an outstanding title, and would defeat the plaintiff, even although the sale by the county to Moore and Evans was invalid.

The record of the acknowledgement was clearly evidence for the

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purpose of showing the reason of a change in the assessment. From the decisions on the subject of tax titles, the great matter appears to be to identify the land, and it was expressly offered and received for this purpose alone. *Strauch v. Shoemaker*, (1 *Watts & Serg.* 175); *Luffborough v. Parker*, (16 *Serg. & Rawle* 351); *Harper v. M'Keegan*, (3 *Watts & Serg.* 246); *M'Cord v. Bergautz*, (7 *Watts* 490); *Morton v. Harris*, (9 *Watts* 323); *Caul v. Spring*, (2 *Watts* 396); *Fager v. Campbell*, (5 *Watts* 288).

That the land was unseated up to probably 1838, was fully proved. A certified copy of the draft of the 5th donation district was used in the proper office from the organization of the county to guide assessors. The land in dispute was represented on that draft as No. 1029, and as such was assessed, and during all this period the tract alleged by the plaintiff to be 1029 was seated.

The cases already cited show it to be unnecessary to assess in the name of the owner. Is the number a more sure mode to identify? The question of identity is for the jury, and they have decided it. *Stewart v. Shoenfelt*, (13 *Serg. & Rawle* 360); *Burns v. Lyon*, (4 *Watts* 367); *Hubley v. Keyser*, (2 *P. R.* 502).

The owner of 1031 knew he owned unseated land in Mercer county; there is no evidence he ever offered to pay his quota of the public burthens; there was not even an allegation of the kind.

The opinion of the Court was delivered by

KENNEDY, J.—The first error assigned in this case, founded on two bills of exception taken by the plaintiff to the opinion of the court, admitting evidence objected to by him, is of no moment, and need not be considered, as we are of opinion upon the facts found by the jury, notwithstanding the admission of it, that the plaintiff is entitled to recover. We therefore proceed to the consideration of the second error, which brings in question the judgment rendered by the court below, in favour of the defendant, on the special verdict of the jury.

The plaintiff claims the land in controversy as a *bonâ fide* purchaser thereof, from those who claimed it under Joseph Cox, to whom the Commonwealth granted a patent for the same, designating it as number 1031 among the donation tracts of land situate in the 5th district. The jury have found that it is so numbered and marked on the ground, but according to a copy of a general draft of the surveys made of the lands in that district, certified from the surveyor-general's office, it is numbered 1029. The jury have also found that it was assessed with taxes as 1029 in the years 1816 and 1817, in the name of a Jacob Herrington, to whom an acknowledgment of a deed of conveyance purporting to have been made previously by the treasurer of the county, founded on a sale for taxes, was shown by the record of said acknowledgment. That a sale of the land for the taxes so assessed was made to the com-

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missioners of the county, who afterwards sold it to Hugh Moore and Hugh Evans, from whom the title so acquired passed, and became ultimately vested in John Sheakley, under whom the defendant claims. Now in assessing unseated lands, it is indispensably necessary that they should be designated or described in such a manner as will or may lead the owners thereof to a knowledge of their being assessed, otherwise it is impossible that they can or ought to be considered as knowing, and therefore delinquent on account of the non-payment of taxes of which they had no means afforded by the assessors, such as are clearly required by the several Acts of Assembly on the subject, of knowing or ascertaining that their lands are assessed. To deprive them of their right to their lands by a sale of them for taxes, without their having the requisite means afforded them of knowing and ascertaining that they have been assessed, would not only be unjust but iniquitous in the extreme. The question, then, presents itself, was such means afforded the plaintiff in the present instance, of knowing and ascertaining that his land, the land in question, was assessed? He knows that his tract, as called for in his patent, was number 1031, and that it was so numbered on the ground; and upon inquiry, from all he did or could well know, it is plain that he would not have found that number 1031 was taxed, *eo nomine*, or by any other description that would naturally lead him to a knowledge of the fact that it was so. But it is said that he ought to have looked at the general draft in the office of the commissioners of the county, which would have shown that the tract claimed by him was there numbered 1029, and that by the books of the commissioners he would have found that it was assessed as unseated land. But why should he have resorted to the general draft, when he had higher and better evidence to resort to for the purpose of ascertaining the location and identity of his tract? In 1816 and 1817, when the taxes for which it was sold in 1818 were assessed, the general draft was not made evidence, for such purpose, in any case. It was not until the 24th of March 1818, that an Act of the Legislature was passed making it so, in cases where the original marked lines could not be ascertained. That the original lines, as found marked on the ground, must govern in determining the location and extent of the survey, is a well-established rule, in general, applicable to all cases; but the numbered corner of a donation survey, of itself, is sufficient to designate and determine the location of the tract, when it can be ascertained, and will overrule any calls contradicting it, either in the return of the survey or in any general draft that may be made exhibiting it. In short, it controls everything. This was settled in *Smith v. Moore*, (5 Rawle 353). It was settled there, also, that the general draft was only, at least, secondary evidence under the Act of Assembly, and admissible only when the original number on the ground cannot be found;

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which is in accordance with one of the most familiar rules of evidence. We know, in point of fact, that the marks made on the ground at the time of making the survey, are the original, and, therefore, the best evidence of what is done in making it; that everything that is committed to paper afterwards, in relation to it, is intended, and ought to be, as it were, a copy of what was done and ought to appear on the ground, in the doing of which errors may be committed, which renders it less to be relied on than the work as it appears by the marks made on the ground.

But the proviso in the close of the second section of the Act of 1818 shows, beyond all possibility of doubt or cavil, that the provisions of the Act have no application or bearing on this case, where the plaintiff is a *bonâ fide* purchaser. The words of the proviso are: "that nothing in this Act contained shall be construed to affect the rights of *bonâ fide* purchasers in cases where the original marked lines can be ascertained." The plaintiff, therefore, when he came to inquire and ascertain whether his land was taxed or not, had only to inquire at the commissioner's office of the county, or at the treasurer's office, whether any assessment had been made on number 1031, or not, and as he must have received a negative answer, he had no occasion to inquire further. And if he had even been told, upon such inquiry, that there was no assessment on number 1031, but 1029 was assessed as unseated land, it is impossible to conceive how he should have imagined, from this information, that in assessing 1029 the commissioners intended and did actually assess 1031. Instead of coming to such a conclusion, it is plain that the only natural, and, indeed, rational conclusion would have been, on his part, that in assessing 1029, 1031 could not have been intended. The circumstance of its being assessed in the name of Herrington, was not calculated, in the slightest degree, as has been argued, to change this conclusion; for the name of Herrington had never been known to have been connected with the ownership of the tract numbered 1031, but with that of 1029 it would seem that it had, which was, if possible, calculated to mislead the plaintiff still further. The sale, therefore, of 1831, for taxes, even if it could with any propriety be said to have been sold on such account, must be considered as a sale made without any taxes having been previously assessed on it, and, therefore, absolutely void: or, giving to it the most favourable construction that it will admit of, which is, that it was assessed by the commissioners according to the designation given to it on the general draft in their office, which is 1029, but clearly erroneous, yet the plaintiff having better and higher evidence of the designation of his tract than the draft in the commissioner's office, was not bound to recur to it for the purpose of ascertaining whether his land was assessed or not; and finding that there was no assessment of his tract according to the marked corner on the

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ground, or the description contained in his patent, he was justified in coming to the conclusion that it was not assessed, and, therefore, that no taxes remained to be paid on it. So, under this view, the sale must be considered void.

Judgment reversed, and judgment entered on the verdict in favour of the plaintiff.

Burkhart *against* Parker.

A rule of court which requires the defendant, on notice, to file an affidavit of defence, is sufficiently complied with by an affidavit made by a third person in the absence of the defendant that he has a just defence to the plaintiff's cause of action, without setting out the particulars of it, or the deponent's knowledge on the subject.

ERROR to the Common Pleas of *Beaver* county.

This was an action on the case in *assumpsit* by Caleb Parker & Co. against Christian Burkhart and Wm. W. Ridley, trading in the name of Burkhart, Ridley & Co. The process was served upon Burkhart only. A rule was taken upon the defendant to file an affidavit of defence in pursuance of the following rule of court :

"In actions of debt and of *assumpsit*, founded on book accounts, promissory notes, bills of exchange, or memorandums, the plaintiff having filed a declaration or statement on or before the return day of the writ or during the term to which the said writ is returnable, may, on application to the court, obtain a rule on the defendant or defendants to file an affidavit of defence, and on service of the rule on the defendant or defendants when he or they reside in the county, if an affidavit of defence is not filed within twenty-one days from the service of the rule, judgment may be signed in vacation, or rendered in term time on motion in default in not making and filing an affidavit of defence. Where the defendant or defendants do not reside in the county, notice of the rule may be served on the attorney of the defendant or defendants, or notice thereof given to him in open court; and if the affidavit of defence is not made and filed within six weeks from the date of the service of the rule, or notice in open court, judgment to be signed or obtained on motion, as where the rule is served on the defendant."

A copy of the rule having been served, L. Burkhart, son of the defendant, in the absence of his father, who had gone to Europe, leaving him a general power of attorney to attend to his business, made and filed an affidavit that the defendant had a sufficient

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defence to the plaintiff's cause of action. On motion of plaintiff, a judgment was entered for want of a sufficient affidavit of defence; the court below being of opinion that the affidavit made by a third person without any statement of his means of knowing anything about it, was not sufficient. To reverse this judgment, a writ of error was sued out.

Shannon, for the plaintiff in error, cited 8 *Serg. & Rawle* 165; 1 *Miles* 121; 6 *Whart.* 277; 1 *Dall.* 248.

Agnew, for the defendant in error, cited 2 *Whart.* 183.

The opinion of the Court was delivered by

HUSTON, J.—There is no doubt of the propriety and even necessity of some established rules regulating the practice in courts of justice. There is, however, much doubt as to whether many of the rules in our Courts of Common Pleas do not more frequently obstruct and destroy the administration of justice than promote it. To make a rule obligatory in all cases, it ought in its language plainly to apply to all cases; and a rule which does not in terms meet the case before the court, ought not to govern such case. Even if the rule does in terms embrace the case, under certain circumstances it may be impossible to comply with it, and such case ought not to be held to be within it. A man may be absent on necessary business when the rule is served at his house, and not return until the time prescribed has expired; or he may be sick and continue so, or die just before or a day or two after the time has expired; and in other cases it may be essential to the due administration of justice, that a case should be excepted out of the operation of the rule.

The above rule makes no provision for a case in which from any cause it is impossible for the defendant to make the affidavit. It does not prescribe the form of the affidavit, nor state by whom it must be made; nor does it require that if made by a third person, he should state how his knowledge was acquired. Christian Burkhart, when preparing to go to Europe, was arrested and imprisoned. As soon as he was discharged, the rule stated in our paper-book was taken and served, but whether personally or by copy at his residence, does not appear. In May he had given a general and full power of attorney to his son to act for him in all cases during his absence, and that son swore that his father had a just and full defence to the whole of the plaintiff's demand in the case to the best of his knowledge and belief. The Judge admits this was sufficient, if sworn to by Christian Burkhart. But the son stated no reasons for his belief. The rule of court does not require this. No man is bound to swear to what the law is: if it is said the son might be mistaken as to his belief, so might the father, if he had made the oath.

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These rules of court, and even Acts of Assembly on the same subject, have been considered, and it has been held they will not be extended beyond the letter, nor to cases within the letter but *not* within the spirit and reason of the law. In 5 *Binn.* 455, executors or administrators were decided to be not bound to file affidavits of defence; because it is not supposed they could know whether there was a defence; yet the rule of court made no exception. The Act of 21st March 1806, directs a mode of proceeding in suits founded on verbal promise, note, book-account, *bond*, &c. &c. Held it did not apply to a bond, with any other condition than the payment of money; and a judgment on a bail bond was set aside. In the same case there was a rule of court requiring an affidavit of defence to a bond, and held not to apply to a bail bond, because a defence might depend on acts of the plaintiff or defendant, or sheriff, as well as the obligor in the bond, and of these he might not be informed. This rule of construction applies more strongly to a rule of court than to an Act of Assembly. See 3 *Serg. & Rawle* 253, opinions of TILGHMAN and GIBSON. In 2 *Whart.* 183, the subject was again under consideration. Judge ROGERS delivered the opinion, and he goes pretty fully into the subject. He states that the words "unless the defendant shall file an affidavit of defence," &c., were evidently used instead of "make an affidavit," in order that in some cases, as of sickness or absence, or where the facts were within the knowledge of a third person, it might be made by some other than the defendant: and that according to the fair construction of the Act establishing the District Court, the affidavit made by a third person is good, if one stating the same things by a defendant would have been good. In 6 *Whart.* 277, the same principles are recognised; and it is said, to require an affidavit to go into every minute matter and negative all possible suppositions, would defeat the ends for which they are directed, and make them rather a matter of critical nicety than of substantial utility.

Judgment reversed, and the cause remanded to the Common Pleas of Beaver county, to be proceeded in to trial and judgment.

Pentland *against* Kelly.

The *levari facias* given to mechanics and material men by the 21st section of the Act of 16th June 1836 is an execution and comes within the provisions of the 6th section of the Act of 13th October 1840, relating to the appointment of a sequestrator.

ERROR to the District Court of *Allegheny* county.

This was a *scire facias* issued out of the court below by J. D. & A. Kelly, by which, after reciting that whereas J. D. & A. Kelly had filed a claim in that court against William Pentland and Mary his wife, formerly Mary Watson, for the sum of \$536.81, for work and labour done in and about the erection and construction of certain houses therein described, the sheriff was commanded that he make known to William Pentland and to Andrew Watson Pentland, heir-at-law of said Mary Pentland then deceased, by William Pentland his guardian, and to all such persons as may hold or occupy said buildings, that they be and appear, &c., which writ having been duly served, and defendants having appeared in court, the cause was tried upon the pleas of "*Nul tiel record* and payment with leave," and verdict rendered for the plaintiff against the defendant William Pentland for \$610.14, and for the co-defendant Andrew Watson Pentland, on which verdict judgment was entered and a *levari facias* issued. Previous, however, to the issuing of the *levari facias*, the premises were taken in execution and levied upon, and at the instance of John Harper, a lien creditor of William Pentland, the court appointed a sequestrator to sequester the rents, issues and profits of the premises, pursuant to the Act of Assembly of 13th October 1840, and a writ of sequestration issued by order of the court. This order of the court was in full force at the time the writ of *levari facias* was sued out by the plaintiffs, and at the instance of the defendant below the court granted a rule on the plaintiffs below to show cause why the *levari facias* should not be set aside, and proceedings stayed in the meantime. The court, after argument, delivered an opinion refusing to set aside the *levari facias*, and discharged the rule.

Black, for the plaintiff in error, referred to the Act of 28th April 1840 (*Pamp.* 474).

Hamilton, contra, cited *McKinney's Dig.* 369; 2 *Parke & Johns.* 824, sec. 69; 1 *Bl. Com.* 60; 5 *Watts* 490; 9 *Watts* 304; 4 *Serg. & Rawle* 401; 13 *Ib.* 256.

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The opinion of the Court was delivered by

ROGERS, J.—In the 6th section of the Act of the 13th October 1840, it is enacted that wherever an estate for life in any improved lands or tenements yielding rents, issues and profits, shall hereafter be taken in execution, the court shall upon the application of a lien creditor, award a writ to sequester the rents, issues and profits of such estate, and appoint a sequestrator to carry the same into effect. The 7th section prescribes the duty of the sequestrator, and the 8th section gives the court the power to exact security and to compel him to the due and faithful performance of his duty. The Act is carefully guarded, highly remedial, and is calculated and was so intended by the Legislature, to protect the interest of the owner of the life estate as well as lien creditors from the ruinous sacrifices, which, it is very well known, too often result from the sale of such estates by the sheriff. The question here is whether the mechanics' lien comes within the salutary provisions of the Act, or whether such creditors are still at liberty to pursue the former method, and by a judicial and forced sale jeopard if not destroy the rights of all others who have an interest in such estate. For this exemption I see no warrant either in the letter or the general policy of the Legislature. It cannot be doubted that the *levari facias*, which is substituted for the *fi. fa.*, inquisition and *venditioni* in the case of the mechanics' lien, is an execution. It is so called by the commissioners in their report, and is process to collect the debt, and is therefore in legal as well as popular parlance an execution. An execution, in the usual legal sense of the word, is a judicial writ grounded on the judgment of the court from which it issues; and is supposed to be granted by the court at the request of the party at whose suit it is issued, to give him satisfaction on his judgment. The *levari facias* is expressly enumerated among the species of execution in *Jacob's Law Dictionary*, and is defined to be a writ of execution directed to the sheriff for levying a sum of money upon a man's lands, tenements, goods and chattels.

As the mechanics' lien is within the letter it is equally plain it is within the spirit of the act; for the sacrifice of property will be the result, whether the execution be issued by a creditor of this description or by any other creditor. It is true that a desire has been evinced to favour this class of creditors by lessening the expense and expediting their remedy; but we must take care to avoid effecting this object, although a meritorious one, by the sacrifice of every person else. They may in some cases be put to a temporary inconvenience, but as their money will be ultimately safe, they themselves will often profit by the increased price which may be obtained for the property by the sequestrator, who may choose his time for the sale and may sell it in his discretion either at a public or private sale, or may pay the debts out of the rents, issues and profits. The Act is imperative. It directs that the

[Pentland v. Kelly.]

court *shall*, on the application of lien creditors, award a writ to sequester the rents. As the Act contains no distinction as to the kind of creditor who may make the application, we do not feel inclined to make any exemptions from what appears to us a wholesome construction of the Act, by doubtful and strained inference. It is uncertain, as this case stands, whether the writ of sequestration was issued before or after the *levari*, nor is it material, as the application, which the court is bound to grant, may be made at any time before the sale. Of the provisions of this Act, which is grounded on general policy, no persons can complain, except those who are desirous of speculating on the misfortunes of their neighbours. And this it has been the object of the Legislature to prevent. The sequestrator has ample power to do right and justice to all the creditors according to the priority of their respective liens. So also, when the interest of the creditors requires it, the court may compel the sequestrator to perform his duty, of which, of course, they must be the ultimate judges. As by a change in the Act of the 28th April 1840, the lien binds only the interest of the person at whose instance the building was erected, and as in the case before us it was a life estate, it is a proper case for the appointment of a sequestrator.

Judgment reversed.

Speise against M'Coy.

Money lost by a wager upon an election, and paid over to the winner, cannot be recovered back from him by means of a foreign attachment at the suit of a creditor of the loser.

Money voluntarily paid in discharge of a void obligation cannot be recovered back.

ERROR to the Common Pleas of Mercer county.

This was a foreign attachment at the suit of Andrew M'Coy against Ezekiel Sankey, in which John Speise was summoned as garnishee. In answer to the plaintiff's interrogatories, the garnishee deposed that he had made a bet of \$1000 with the defendant, Ezekiel Sankey, upon the result of the election: that he was the winner, and that the money had been paid over to him by Sankey before the attachment was served upon him.

The court below was of opinion that the plaintiff was entitled to recover, and rendered a judgment against the garnishee.

Mahon, for the plaintiff in error, argued that it was clearly settled that money lost upon a wager and paid over could not be

[Speise v. M'Coy.]

recovered back by the loser; and it would seem to follow necessarily that the loser should not have it in his power to place another in a better situation than he was himself; and the recovery here would be for his advantage, because it would relieve him of so much debt as would be paid by it. *M'Allister v. Hoffman*, (16 Serg. & Rawle 147); 7 *Watts* 294; 2 *Watts & Serg.* 59; 3 *Id.* 405.

Agnew, contra. The settled principle that a lost wager cannot be recovered back is only applicable to the loser himself, to whom the turpitude of having violated the law attaches; but sound policy would seem to dictate that his creditor, who is perhaps an innocent sufferer by the illegal transaction, should not be prevented from recovering the money. 7 *Watts* 343; 3 *P. R.* 495.

The opinion of the Court was delivered by

GIBSON, C. J.—By the statute in force when this wager was made, the contract was illegal; but after it was executed by payment over, the money could not be recovered back, as was held in *M'Allister v. Hoffman*, cited in the argument. But it is said that the court went, in that case, on the turpitude of the parties which affected them individually,—an objection which does not lie to the plaintiff in this instance,—and that, as the contract was null by the letter of the statute, repetition might be had of the money in the hands of the winner as the proper money of the loser. The court, however, objected to the action, not merely for the individual disability of the plaintiff, but for the impurity of the contract which had, from all time, prevented courts of justice from handling such a thing, or anything growing out of it. An executor or administrator of such a loser, would not be allowed to recover back money so paid even for the benefit of creditors; for it could not be told that the decedent's kindred or legatees would not share in the benefit also; and the same effect would be produced by sustaining an attachment in the loser's lifetime, because he would be exonerated by it *pro tanto* from payment of a debt. What more easy than to elude his personal disability, if the difficulty consisted in that, by procuring a convenient creditor to pay himself out of the money in the winner's hands by the instrumentality of an attachment, and thus enable the loser to keep just so much in his pocket, which he would else be compelled to disburse? An attaching creditor's recovery would inevitably inure to the benefit of his debtor. There is besides another principle to be met, which is decisive of the cause, independent of considerations that are personal to the parties. By permitting the money to pass into the hands of the winner, the loser voluntarily paid a debt which, though void as to its legal obligation, has the effect of preventing a recovery back. *Munt v. Stokes*, (4 *T. R.* 561), is in principle the case before us. That was an action to recover back money paid on a *respondentia* bond which was void by statute; and Lord

[Speise v. McCoy.]

KENYON, having observed that the contract was *malum prohibitum*, and not *malum in se*, said: "But the ground on which I go is this, that there was no misrepresentation, or any improper conduct by the defendants, to extort the money from the plaintiffs; but the plaintiffs, knowing the whole transaction, and the law also, as they were bound to do, voluntarily paid it. There was nothing contrary to conscience in the defendant's receiving the money which they had advanced; the plaintiffs are therefore entitled neither in law nor equity to recover it back." Like the bond in that case, a wager on the event of an election is not *malum in se*, but *malum prohibitum*; and there is no more well-founded objection in morals to the receipt and retention of the money paid on the one of them than on the other, after the risk has been run which was the inducement to the contract. Now the bar to an action for the recovery of it back is not want of individual capacity to sue, but want of a cause of action. Still it is urged that such payment over is fraudulent as to creditors by the 13 Eliz. c. 5, inasmuch as it is in effect a gift of the money. Supposing it to be a gift, as it is in effect, it follows not that it is within the purview of that statute, though the donee be not a child, provided the donor were not indebted at the time; and that the loser in this instance owed a shilling, is no part of the case. That we have not been disposed to follow out the stern interpretation put on the statutes of Elizabeth by the British judges, is manifest from the decision in *Lancaster v. Dolan*, (1 *Rawle* 231), that a voluntary conveyance is good against a subsequent purchaser with notice. Even those judges themselves evinced, in their earlier decisions, a degree of indulgence to gifts against subsequent creditors, which they denied to gifts against subsequent purchasers; but Lord HARDWICKE, it seems, pared it down till it reached no further than a family settlement by a father after children born; and perhaps the decisions of the English Chancellors in regard to the distinction can scarce be reconciled. The difference between the two statutes in the tone of their construction is not very great; still it is something, and as we have already relaxed it as to the one, it affords a stronger reason for relaxing it as to the other. In a case like the present, where the importance of the property involved bears no proportion to the importance of the principle, I speak not without hesitation; but it seems to me that a gift of a chattel to a stranger by a person not indebted, unaccompanied by evidence of a design to become indebted, or any badge of fraud to deceive subsequent creditors, would not be within the true intent of the statute. Circumstances may have called for a severer construction in England, which do not exist here; and I am unable to see why a fowling-piece, a trinket, or any thing else, presented by a gentleman of indisputable opulence to his friend, should be liable to execution for a bill subsequently run up by the donor

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with his butcher or his baker. There was no debt in the present case to be attached; and the garnishee is entitled to judgment.

Judgment of the court below reversed, and judgment here for the defendant.

Gilchrist *against* Rogers.

It is error to submit evidence to a jury with instruction that they may infer a promise to pay, when no such inference can legally arise from it.

ERROR to the Common Pleas of *Crawford* county.

Daniel Rogers against John Gilchrist. This was an action on the case in *assumpsit*, the facts of which are sufficiently stated in the opinions delivered:

Derrickson for the plaintiff in error.

Riddle for the defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—The plaintiff in error, who was the defendant in the court below, was a contractor for making a section on the Erie extension of the Pennsylvania Canal, at or near Hartstown, in Crawford county, and in March 1839 sub-let the making of it to a Niel O'Donnell, who employed hands for the purpose of doing the work, among whom was the defendant in error, to whom, on settlement, there was a balance of \$47 or \$48 coming from O'Donnell. The defendant in error brought this action against the plaintiff in error for the purpose of recovering this balance, alleging that the plaintiff in error had by his undertaking and conduct rendered himself liable to pay it. On the trial of the cause evidence was given by the plaintiff below tending to prove that while he and others were engaged in working on the section under the employment of O'Donnell, O'Donnell seemed not to be attending to the matter very closely, and was not paying the hands, or at least some of them, as they wished: that the defendant below was spoken to by some of them on the subject, but not by the plaintiff; that upon being spoken to, he said he would draw the estimate, that is, the money for the work done, as it progressed, from the State, and it should not go out of his hands until every debt against the section was paid; that he would apply the estimate towards payment of the debts against the section, and that O'Donnell should not handle a dollar of it until the hands were paid; that this was told to the plaintiff below among others; that the

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defendant below said he would take the work into his own hands; that this, however, he did not do until after the plaintiff had quit work and his claim had accrued, when the superintendent of the work on the part of the State, interfered, and required the defendant below to do so, otherwise he would declare the section abandoned, and relet it. Evidence was also given going to show that the defendant below had expressly agreed to pay some of the hands for their work done on the section under O'Donnell, if they would get orders from O'Donnell directing him to do so; but nothing of the kind was shown in favour of the plaintiff below, or that the defendant below would pay him in any way whatever, unless it were that he would draw the estimates made on O'Donnell's work and would not pay over to him anything until the hands who worked for him on the section were first paid out of the estimates. Evidence was also given, on the part of the defendant below, showing that he had paid out all the moneys received by him on the estimates in discharge of debts owing by O'Donnell for work done, or claims against him on account of the section, which does not appear to have been repudiated or contradicted. Yet under this state of the evidence the court below instructed the jury, "that if the defendant below found that O'Donnell was unable to continue the work in June, and he took the work into his own hands, and carried it on himself, as is testified to by Newton, he would be bound to pay the hands, who continued to work on the job, although they were hired by Neil O'Donnell, who at that time superintended the work; and in that event O'Donnell would be considered as the defendant's agent, and he would be bound to pay the hands, although he did not personally make any agreement with them to do so. Or if after O'Donnell failed in June, the defendant's acts and declarations were such as to induce ordinary men to believe that the work was carried on by himself, and at his expense, and the plaintiff from those acts and declarations did believe so, and continued to work in consequence thereof, the defendant would be bound to pay him."

Now it appears to us that the court below, in submitting the case to the jury, have given a colouring to it in favour of the plaintiff, which is not warranted or supported by the evidence. We can perceive no evidence tending to prove that the defendant below, in the month of June, took the work of the section into his own hands, and carried it on himself, nor does Newton testify, as the court say to the jury, that he did, nor to anything from which such a deduction could be fairly made by the jury. Neither does evidence appear to have been given of any acts and declarations done and made by the defendant below, which could or ought to have induced any man to believe that the work of making the section was carrying on by himself and at his expense, and in such a manner as to render him liable to the plaintiff below for his work done under his contract made with O'Donnell, whatever the

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plaintiff below may have thought of the acts and declarations of the defendant. The whole of the evidence given by the plaintiff below, was extremely loose and unsatisfactory at best, and such as by no means justified the court in submitting the liability of the defendant to the plaintiff on the grounds that they did. It was leaving it to the jury to place the liability of the defendant to pay for the work done, upon facts which the evidence in no wise tended to prove or establish; which was clearly error. The judgment is therefore reversed, and a *venire de novo* awarded.

HUSTON, J. (dissenting).—It sometimes happens that the opinion of the law as applied to a case given by the judge below is reversed, because a different view of the facts is taken here from what struck the judge who saw and heard the testimony. This also happens from the fact that all the testimony given at the trial is not spread on the paper-book given to us. From the indolence of counsel, the preparing the testimony to be attached to the record is left to him who takes the writ of error. The opposing counsel neglects to examine it, and the judge signs it supposing it to have been examined by the opposite counsel, and to be correct; and more than this, all which is sent up with the record is not put on the paper-book, or some note or memorandum on it is omitted. In this case these words "defendant also gave evidence of the amount he had paid out, and the state of his accounts with O'Donnell, which were referred to the jury," were not on the paper-book, and no doubt were omitted as immaterial, yet led this court to consider matters as having been submitted to the jury on which no evidence had been given. An acknowledged and palpable error in the copy of the charge led me to examine the whole record; and a careful perusal has convinced me that the case is not before us as it appeared in the court below. On the same view of the facts I do not know that I would not agree with the opinion delivered; but I do not view the facts, or fair inferences from the facts, as they have appeared to the other judges. I believe the view taken by the president entirely correct as to the facts and the law.

The defendant below entered into a contract to make section 62 of the Erie canal; this was in the fall of 1838. We have not the date, nor any evidence of what he had done; but we know that 15 per cent. on all his estimates was retained until the completion of the work. On the 22d March 1839, Gilchrist underlet to Niel O'Donnell, reserving to himself 20 per cent. as security until the final estimate was made, out of which he was to receive \$500, and retain it unless previously paid, also retaining the right to the 15 per cent. retained on the grubbing, excavation and embankment done in 1838; O'Donnell to complete the contract and receive the future pay. We have not the contract at large between them, but a short abstract. The judge in his charge states that Gil-

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christ reserved to himself the right to draw all the estimates. Gilchrist then had a deep interest in having this contract completed, and had taken no little precaution to keep himself safe. An estimate was paid in June, and it would seem Gilchrist had drawn that. Soon after this O'Donnell went off to Butler. Newton, a store-keeper, who had trusted him, followed him and brought him back—arrested him. "After this he came to my store; I refused to let O'Donnell have goods unless defendant would be security. Gilchrist told me to let him have goods and charge them to him direct; that he would draw the estimate and it should not go out of his hands till every debt against that section was discharged." He understood Gilchrist to say O'Donnell would still continue to superintend the job. This information witness stated he communicated to Rogers the plaintiff, and some other hands the same day. He also stated that Killan, the clerk, and O'Donnell, drew orders in favour of the hands, which Gilchrist paid, and his son got things for the boarding-house for the hands; but he fixes no dates for these things. Now it is possible at another trial to fix dates by his books, &c.

Another witness was told by Gilchrist about six weeks before the October estimate, that he would draw the next estimate and apply it to the debts of the section; that the hands should be paid. To James Wright he said he would pay the hands; O'Donnell should not handle a dollar until they were paid.

Killan, the clerk, proved the plaintiff's demand. He proves that the plaintiff promised to pay him, the witness, and Farly O'Donnel. Witness had a pass-book, and got what things he wanted at the stores on the credit of Gilchrist; the hands got some pay out of the stores.

M'Bride swore he was a hand on section 62; the defendant was going backward and forward giving orders as contractors usually do; told O'Donnell to discharge hands when they would not do as ordered, and send them to him and he would pay them. At one time the hands quit for fear of their pay, and Farly O'Donnel, the boss, went to defendant, and came back and set them to work again. Witness was refused feed at the store; defendant gave an order and he got feed.

Farly O'Donnel relates that the hands quit and he went to the defendant who promised to pay him; told him he would not pay any money to Niel O'Donnell till the hands were paid; he told this to the hands and they went to work. But we have no dates given by any of these witnesses. M'Fann testified that at the June estimate he had an account against O'Donnell, who gave an order on Gilchrist, who paid him; after this he did not trust O'Donnell, but gave goods to the hands and charged them to Gilchrist, who paid him.

To judge of this case we must look at the situation of the parties. The engagements of Gilchrist, if he made any, to pay the

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hands, were not made by a stranger who had no interest and who was to derive no benefit, but by one at least as deeply interested as O'Donnel. Where twenty or more hands are at work on such a job, several come at one time, and what is said to them all is said to each; and often where a difficulty arises, what is said to one is said to all, though not all present. When he told Newton he would take the job into his own hands and carry it on himself, to charge himself direct for goods sold to the hands, that O'Donnel would still superintend, and this was told the same day to the plaintiff and others; when he told several others that he would draw the estimates and pay every debt on the section, and to some that the workmen should be paid first, and paid orders to those hands who wanted and orders to storekeepers, these sayings and doings would be known to all, understood as applying to all, any jury would be justifiable in so understanding them; but when all quit and he told the clerk and the boss that he would draw estimates and pay, and this was to be told to the men, and they began work, this was a direct contract with all and with each. At the next trial the dates of these declarations can and I suppose will be ascertained. For as I understand the counsel, it is admitted that Gilchrist is liable from the time he distinctly assumed the work; as to when, they differ from June to October. The jury were referred to his acts and declarations, and told to say whether the plaintiff did continue in consequence of them, and if they were such as to justify him in so considering them, they ought to find for the plaintiff. But some witnesses had stated what he said to them was, that he would pay all the estimate to the debts of the section, and the defendant's counsel asked the court to state the law if the jury believed this was the extent of his engagement. To this the court said, "but if the jury believe from all the evidence, the defendant was only to pay the hands what money was left after paying the debts against the job, which he had assumed to pay in order to have the work progress, then the jury will ascertain whether the defendant has in his hands money after making those payments, and if he has not, then verdict should be for the defendant; if he has, it should be for the plaintiff for the balance due for his work, if the defendant has that much left in his hands." This last sentence is copied from the judge's charge. It was unintelligible in the paper-book. After the most deliberate consideration and reconsideration, I can see no error in the view taken of the cause and the evidence, or in the law as stated to the jury, and I would affirm the judgment.

The fact that Gilchrist was to draw all the estimates has an important bearing on this cause. The man who is to pay generally receives the fund which he is to distribute. If so unusual a business, as that one was to hire and another to receive all money earned, and pay, it ought to have been known to the men hired, and unless made known to them I doubt its fairness and legality;

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at all events a small assumption would bind such receiver of the estimate to pay those who earned it; his payment to one or several would be evidence to be left to a jury of his liability to all; nothing but an express understanding among all the labourers would leave him at liberty to pay one-fourth or even half the workmen, and get the labour of the others for nothing. I would consider the direction to Newton and M'Fann, the store-keepers, as intended to be communicated to the hands as they must be, and as intended to induce the hands to continue, as sufficient evidence to charge a person situated as Gilchrist was, for all work after the first of those orders. The subsequent directions were only repetitions of it. The time when these several declarations and orders by Gilchrist were made, is material: if soon after the June estimate, it is one thing; if not for months after, another; and the date of the October estimate is material. The October estimate of \$1550, and the 15 per cent. on it retained, were earned by the labour of this man and others. Gilchrist has drawn the estimate and the 15 per cent. I can see no principle of law or justice which will enable him to retain any part of what the hands earned, even if the jury disbelieve the testimony of repeated express promises made by him.

Judgment reversed, and a *venire de novo* awarded.

Lowrey against Tracey.

A judgment opened and defendant let into a defence upon the merits is not an action pending, such as is subject to the provisions of the compulsory arbitration act.

ERROR to the Common Pleas of *Erie* county.

A judgment having been entered upon a warrant of attorney, at the suit of Nathaniel A. Lowrey against Burrell Tracey, for \$450, on affidavit of the plaintiff, the court opened it and let the defendant into a defence on the merits; the lien to remain. The defendant then proceeded to refer the case to arbitrators under the compulsory arbitration act; which the plaintiff objected to in all its stages, and upon an award being made for the defendant, moved to set it aside, but the court overruled the motion and the plaintiff sued out this writ of error.

Galbreath and *Pearson*, for the plaintiff in error, cited 8 *Watts* 424: 39 Sec. of the Arbitration Act.

Walker, contra, cited 1 *Rawle* 341; 2 *P. R.* 165; 10 *Watts* 130.

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The opinion of the court was delivered by

GIBSON, C. J.—The opening of a judgment, as it is called, has not the supposed effect of turning the cause into an action pending within the meaning of technical language or the compulsory arbitration act. The phrase, though current on the bench and at the bar, is strictly an inaccurate one; for we cannot conceive it possible that a judgment which is left to stand as a security for what may be due, could retain its lien if its jaws were unclosed. Yet that it shall so stand, is a principal condition on which the applicant is let into a defence, and without which the opening of the judgment would be a dissolution of it equivalent to setting it aside. It is in effect, however, an award of a collateral issue to try the facts alleged in the defendant's affidavit; and it is, in this respect, like a feigned issue sent from chancery to a court of law, which is moulded by the Chancellor, who directs what facts are to be tried, the evidence to be given, and the parts of the case to be confessed; and who retains also a right to control the verdict by granting a new trial. The time has been when the same practice was observed by our courts in the granting and trying of issues like the present, but inexperience of prothonotaries from the increased activity of the principle of rotation, and looseness of practice from the inattention of the profession to matters of detail, have led to an almost entire neglect of these admirable precautions; and though every thing not denied in the affidavit ought to be taken *pro confesso*, the parties are now usually left to try the cause at large, the plaintiff making out his case on original grounds, and the defendant being allowed to make defence without regard to his affidavit. This throwing open of the whole case has led to a misconception of the nature of such an issue, which reflects very little credit on the forecast of the judges; but as the matter belongs to their discretion, it is not the province of an appellate court to control them in the exercise of it. Still there may be such a thing as the award of an issue on special terms, and where that occurs, they can be enforced only by his own superintendence at the trial: certainly not in a trial before arbitrators. Nor could the judge's conscience be so well informed by the result, which would thus be put beyond his control. Moreover, the plaintiff ought not to be subjected to unnecessary or unreasonable delay, by a proceeding which is accorded to the defendant as a matter of grace, not of right; and hence, as he was bound to take short notice of trial, it was the practice formerly to order the issue to be put at the head of the trial list. But the plaintiff would be exposed to endless vexation and delay, if he were compelled to go first before arbitrators and come back into court by appeal before he could have a trial by jury on the terms ordered by the court. To arbitrate such an issue would not comport with the principle of *festinum remedium*. It would be just as rational to arbitrate a writ of inquiry of damages, which is also a proceeding to in-

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form the conscience of the court, or an interlocutory judgment, which the court itself may liquidate without the interposition of an inquest. The court below, then, ought to have quashed the rule of arbitration with the proceedings pursuant to it.

Judgment reversed, and a *procedendo* awarded.

Bingham *against* Rogers.

Common carriers may by special contract limit the extent of their responsibility for the safety of goods delivered to them to be carried.

In an action against a common carrier to recover the value of goods delivered to him to be carried, the owner of the goods, being the plaintiff in the action, is not a competent witness to prove the contents of the trunk or the value of the articles which it contained.

ERROR to the District Court of *Allegheny* county.

William F. Rogers against John Bingham and others, late owners of the "Emigrant Line." The defendants were common carriers by railroad and canal between Philadelphia and Pittsburgh. This was an action on the case against them for negligence, &c. whereby the plaintiff, as he alleged in the declaration, lost a trunk or box containing the following articles, viz :

Tredgold on the Construction of Steam Engines and Boats, illustrated by a volume of Model Engravings, \$30. Templeton's Millwright's Guide, \$7. Other valuable books, \$7. A stamped article of agreement between the Bahia Steam Engine Navigation Company and William F. Rogers, accompanied with letters of reference, \$242. A box of jewelry, of great value, collected principally in South America, \$91.84. A pocket-book containing a note on the Bank of England for the payment of £50, \$242. A complete set of mathematical drafting instruments, \$5.68. A brass model for a steam engine, \$250.

The plaintiff produced and proved the execution of the following receipt :

Bingham's Emigrant Line, Philad., October 21, 1840.

No. 156. Received of Messrs Rogers & M'Donald \$32.51 for two seats to Pittsburgh and 545 pounds extra baggage, including one trunk, already forwarded.

Each passenger entitled to 50 pounds baggage free. All baggage at the risk of the owner.

BINGHAM & BROTHERS,
Per M. DAVIS.

The plaintiff went on in one of the defendants' boats, with other

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emigrants, and their baggage. It was proved that the trunk said to have been lost was marked with the plaintiff's name. Every effort was made by the defendants to recover the box, but without success. On the day previous to the date of the above receipt and of the plaintiff's departure from Philadelphia, he and some of his friends went with their luggage to the defendants' depot, intending to take passage to Pittsburgh. After the luggage had been delivered to the agents of the defendants, some dispute arose about the amount of fare. The plaintiff refused to pay what was asked, and the agent gave him back his boxes and trunk, and he did not go that day. The next day the plaintiff went to the depot, and alleged that one of his boxes was missing, and must have gone on; and the defendants then gave the foregoing receipt, and the plaintiff went on.

After showing the delivery and loss of the box, the plaintiff offered his own deposition to prove the contents and their value. The defendants objected, on the ground that they were not articles of clothing, or necessary to a traveller, but common lumber or merchandise; but the court admitted the evidence, and sealed an exception.

The defendants requested the court to instruct the jury:

1. That the plaintiff was bound by the notice contained on the face of the receipt: "All baggage at the risk of the owner."
2. That there must first be a delivery of the goods to the care of the defendants before their liability can attach.
3. That the defendants are not liable if there was no intention on the part of the plaintiff to intrust his baggage to their care.
4. That after notice given limiting the risk, as above, on the part of the defendants, they are not liable, unless the plaintiff has shown that the loss was occasioned by either the misfeasance, malfeasance, or gross negligence of the defendants; and that the burthen of proving it lies on the plaintiff.
5. That the plaintiff was not a competent witness to prove the contents of his lost trunk beyond the ordinary articles of necessity or convenience to a person travelling, so as to charge the defendants.

The court below instructed the jury as follows:

"Common carriers are liable, as insurers, for the property committed to their care. It is contended that the defendants are released from their common law liability by the insertion of the following clause in the receipt or bill of lading given by their agent: 'All baggage at the risk of the owner.' But the court instruct you that common carriers cannot, by notice, limit their liability as to the safety of the goods. The risk is, in that respect, upon them, and cannot be shifted to the owner. They may, by notice brought home to the owner, require the latter to state the nature or value of the property, or may, for that purpose, make a special acceptance. But they cannot, by notice, rid

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themselves of the duty imposed by law to be answerable for the goods, unless the loss accrued by inevitable accident, or the acts of public enemies, or the owner has been guilty of fraud. Such has been the uniform decision of this court. Their authority and reasons for this decision will be found stated at length in 19 *Wend.* 235, 251; 21 *Ibid.* 153, 354.

Your first inquiry will therefore be; was the trunk or chest in question delivered by the plaintiff into the custody of the defendants or their agent to be carried from Philadelphia to Pittsburgh, and lost or not delivered again to the plaintiff? This, of course, is a question of fact for you to decide. The plaintiff has proved the delivery by two witnesses, and by the bill of lading or receipt signed by the defendants' agent, by which it appears that the plaintiff paid an extra price for the carriage of his goods. The receipt of this trunk is attempted to be denied by the defendants' witnesses, who deny it in the face of their own receipt, given at the very time when the parties had the dispute whether the trunk had been sent on or not in the defendants' baggage-cars. Such testimony should be looked on with great suspicion. It is even doubtful whether it would have been received at all, if it had been objected to, as the witnesses might be said to be interested to clear themselves from negligence, for which they were liable to their masters. And usually a common carrier will not be permitted to give evidence to contradict the bill of lading signed by him, unless it be to prove that a fraud or imposition was practised in him. *Warden v. Greer*, (6 *Watts* 424).

If the jury should be of opinion that the trunk or box in question was delivered to the defendants and lost, the only other question will be the amount of damages. On this point the testimony of the plaintiff has been received to prove the contents of the trunk from necessity. Nevertheless, his testimony should be scanned with great caution and distrust, as he is directly interested. This is not the common case of a passenger by stage-coach from one city to another, whose trunk is presumed to contain but the common apparel and the necessary baggage of the owner. The defendant solicited the custom of emigrants. He charged a separate price for carrying their trunks and boxes. He knew well that emigrants carry more than their usual clothing. They travel with their little all, their whole personal estate along with them, their books, sometimes their tools of trade, and all their most cherished articles of personal property.

The plaintiff would appear to be a bachelor—came last from Havre, in France—had been in Brazil—was probably a machinist and engineer. Is there anything improbable in his statement of the things contained in this trunk?—his books on engineering—his models—his personal ornaments, jewelry? You are not bound by his valuation. He may set an extravagant or imaginary value upon them. Especially should you disregard the value put

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on his papers establishing his character as a man and an engineer. A man may put an imaginary or fanciful value on many articles from certain association of ideas, as a ring with a deceased friend's hair, &c. But the jury should inquire their real value in market, or the cost and trouble in making them when they have no known market value. These principles will apply also to the valuation of the model. But although the plaintiff has in this case been admitted from necessity to prove the contents of his trunk as to all matters which an emigrant might be supposed to carry with him as personal property (not including merchandise or money), because there is the same necessity as in the cases cited, yet the same reasons given for not suffering him to prove money will apply in this case as in the case of *David v. Moore*, (2 *Watts & Serg.* 230).

You are, therefore, instructed not to include in your valuation the note for £50, not because the defendants in this case might not have been held liable for it, under the circumstances, if proved *aliunde*, but because it would be dangerous to permit the plaintiff to establish the amount by his own oath."

The jury found a verdict for the plaintiff for \$537.60.

Errors assigned:

1. In instructing the jury that common carriers cannot by notice limit their liability for the safety of goods.
2. In admitting the plaintiff's deposition to prove the contents of the box and their value.

Wylie and Williams, for the plaintiff in error, contended that it was competent for common carriers to limit the extent of their liability by contract. *Co. Lit.* 89 *a*; *Jones Bail.* 103; *Burrow* 2300; *Carth.* 485; 1 *Salk.* 143; 19 *Wend.* 239, 266; *Ld. Raym.* 107, 918; 5 *Rawle* 179; 10 *Watts* 347; 1 *Stark. Ev.* 112; 9 *Watts* 87; *Story's Bail.* 549; 6 *Johns.* 180; 2 *Kent* 606; 5 *East* 507; 4 *Price Ex. Rep.* 31; 5 *Barn. & Ald.* 53; 1 *Hen. Bl.* 298; 3 *Taunt.* 264; 2 *M. & Sel.* 1; 8 *Term Rep.* 532; 4 *Barn. & Ald.* 39; 4 *East* 371; 8 *Taunt.* 144; 1 *Stark. Rep.* 72; 1 *Gow* 103. As to the admissibility of the plaintiff as a witness, they cited *Co. Lit.* 6 *b*; *Ld. Raym.* 191; 2 *Hawk.* 433; 3 *Wils.* 18; 2 *Watts & Serg.* 230; 9 *Wend.* 85; 1 *Pick.* 50; 3 *Watts & Serg.* 21.

Darrah and Williams, contra, on the first point, cited 1 *Esp. Rep.* 36; 1 *T. R.* 23; 9 *Watts* 87; 15 *E. C. L.* 422; 2 *Hill* 623; *Story's Bail.* 567; 16 *East* 244.

The opinion of the court was delivered by

HUSTON, J.—Much of the law of this, and perhaps every country, is founded on the usages of the people, and those usages vary as the business changes, or as the legislature interferes to modify and prescribe rules for the regulation of business and contracts

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relating to business. The law relating to the liability of common carriers is very ancient, and is at least as old as the statutes of hue and cry, by which the vicinity was made liable for goods of which any person was robbed. These last are now obsolete or repealed. They were required by a state of barbarism and of sparse population, and by the fact that it was at least probable that many, if not all, in the neighbourhood were concerned in the robbery, or partook of the spoils. In such a state of society it was not unreasonable to suppose common carriers might know something of the persons by whom they were robbed—might give notice to the robbers, and share in the plunder. The state of society, the close settlement of the country, the vicinity of populous towns and the orderly life of the inhabitants of the country, have banished gangs of robbers pretty much. Still it remains the law that common carriers are liable for all losses not occasioned by the enemies of the country or the act of God.

In the process of time, stage-coaches for the carriage of passengers and their necessary clothing or baggage came into use, and the question of their liability, and to what extent, arose. These modes of conveyance had been unknown for centuries after the doctrine as to common carriers had been settled. There are intimations that if the owner is along, the care of his goods devolves on him and not on the owner of the vehicle. It, however, became understood that there was some responsibility on the coach owners, and they endeavoured to protect themselves by advertisements and notices. The effect of these was the subject of frequent discussion, and different judges at *Nisi Prius* gave different opinions. Even when removed to the courts in banc, the decisions of the Common Pleas and King's Bench did not always accord with each other. Perhaps they at length agreed that a notice in a gazette or hand-bill did not avail, unless on proof that it had been actually read by the owner of the goods. Acts of Parliament were passed during the reign of George III, defining and regulating the liability of stage owners, and many decisions in the English reports are founded on these, though the Act is not noticed in the opinions. At length it is apparent the danger was apprehended to the carrier and not from him. As the liability arose from the hire paid, it was provided that no person should recover beyond a certain sum, unless he gave notice of the value contained in his trunk.

It is admitted in 19 *Wend.* 246, 7, that cases are found from *Southcote's Case*, (4 *Coke* 84), down to *Nicholson v. Willan*, (5 *East* 513), and even later, 1 *Stark. R.* 186, where courts have assumed it as law, that a special printed or written notice given to the person sending goods, may limit the liability of the stage owner. The last Act in England, passed in 1836, I believe, is referred to, and it is stated that, except as to the specified articles, it had brought the responsibility of stage owners back to the common law as respects carriers. We quote Acts of Parliament, not

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from the statute-book, but from extracts in reports. I have met with what purports to be the 6th section of that Act, as follows: "Nothing in this Act shall extend or be construed to extend in any wise to affect any special contract between such mail contractor, stage coach proprietor or common carrier, and other parties, for the conveyance of goods and merchandise." This is not going back to common law. The 9th section provides that though the passenger has stated that his trunk contains articles of a certain value, and paid a price for such value, yet if it is lost, the stage owner shall not be liable beyond the articles and value which the owner shall prove by legal evidence. Nothing can more strongly show the idea of the legislature that there was some danger of the stage owners being made to pay for what they never received, or more than the value of what they received. The case in New York urges strongly the example of that great mercantile nation as of weight here, though the Act is not obligatory.

I come now to the decisions of this court. At a time when our rivers were obstructed by falls and rapids and rocks, there were few carriers. Several neighbours joined to build an ark or boat, to carry the produce of their own farms and some neighbouring farmers down some of our rivers in times when there was high water. For a long time, it was not understood by the owners of boats or of goods that their liability was the same as that of carriers at common law. See 8 *Serg. & Rawle* 533. At length rocks were removed, and the navigation rendered more safe, and there were more boats, and more expertness and skill in those who navigated the rivers, and the common law doctrine came in; but I can well recollect the time on the Susquehanna when a higher price was paid to boatmen who engaged against all accidents except the act of God. The common law doctrine is now generally understood, in courts and among boatmen, to apply. On the Mississippi and its large branches insurance at an office is however common; perhaps because the boat-owners could not pay the amount of goods shipped. To come to cases of stage owners and canals: In *Beckman v. Shouse*, (5 *Rawle* 179), it is said, "It seems to be settled, though many learned judges have expressed their regret, that carriers by land may by a special contract limit their responsibility, though not throw it entirely off, in case of gross negligence or fraud." See also *Atwood v. The Reliance Company*, (9 *Watts* 89).

There is another point, of great and increasing importance in this case. The trunk alleged to have been delivered to the carrier contained no clothing, but so many guard-chains and rings, &c. The article of agreement with the Bahia Steamboat Navigation Company, without stating its date or terms, or whether it had been completed or abandoned before the plaintiff left South America, or whether the company was ever organized or was broken, was one item sworn by the plaintiff to be worth \$242. Without

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other evidence, it is not easy to say it was worth a cent. The brass model for a steam engine, called in the affidavit of the plaintiff a small brass model of an improved rotatory engine, the object of which was to overcome the dead power of steam—his own invention—worth \$250, &c. We see and hear of so many improvements in steam engines, which please nobody but the inventor, and which are not feasible or practicable, that I would long hesitate to pay so dearly for any model never tried or approved by any but the inventor. Besides, if it was his own invention, he can have another made, and the brass and cost of workmanship is the only loss. It seems this man had been in Brazil, and last in France, but how long at either place, or when he left, is not stated. He engaged his passage in what the defendants call the Emigrant Line, and took a receipt. We are not aware of any rule or principle of law which requires or admits the application of different rules of evidence or principles of conduct, in the ordinary transactions of life, to one class of men, or men of one nation, from what are applied to all men in such situations. If a foreigner should sue for goods sold and delivered, he must prove the sale and delivery, as if he had been a native; and in case of any contract made by him, he must prove it by legal testimony. Now if a merchant or other person send a box or boxes of goods by a carrier, he must prove the contract and value by some other testimony than his own oath. *Clark v. Spence*, (10 *Watts* 336), states this expressly. In that case it was agreed that the party may by his own oath prove the clothes, and even personal ornaments contained in a trunk containing the clothing of a passenger. Perhaps where those clothes are set at a very high value, or the ornaments are very numerous and estimated at high prices, it may be found necessary to require some proof that the party alleging the loss actually possessed such articles of such price when at home, and neither sold them or left them at home, or the place of his or her last residence. If an emigrant must bring proof of a parol contract before he can recover on it, we do not see why he can or should recover on the severest legal liability known to the law, without the ordinary legal proof that he possessed certain articles, and their value, and that he delivered articles of such value to the carrier.

If the plaintiff must in every other instance prove his case by legal evidence, we see no reason for extending the exceptions from necessity beyond those already established. Whether going on a trading journey or one of business, or travelling to the west with intention of settling permanently, the party must, to recover against a carrier, prove he had the articles of merchandise, tools of a trade, or other goods or chattels, not excepted by decided cases, and the value of them; and this whether he has always resided in this country or lately come from a foreign nation. And it is time that it was generally known and understood that if two parties make a contract and reduce it to writing, it binds both

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parties, at least so far as a construction has been put on such contracts by the tribunals of justice.

Judgment reversed, and a *venire de novo* awarded.

Porter against M'Ginnis.

Where land is sold by the sheriff, and a person who claims title to it, in good faith, gives notice that the defendant in the execution, as whose property it is sold, has no title to it, and he afterwards becomes the purchaser, he is not thereby estopped from setting up the title thus purchased, to protect himself from an action of trespass *quare clausum fregit*.

Quære, whether a non-resident disseisor acquires title by the Act of Limitations to more land than is actually enclosed and cultivated.

ERROR to the Common Pleas of *Clarion* county.

This was an action of trespass *quare clausum fregit* by James J. M'Ginnis against Alexander S. Porter, in which the defendant pleaded not guilty and *liberum tenementum*. The cause was so imperfectly brought up as to render any other statement of it than that contained in the opinion of the court impracticable.

Howe, for the plaintiff in error, cited 4 *Watts & Serg.* 78; 2 *Watts* 384; 7 *Watts* 400.

Pearson, for the defendant in error, cited 2 *Watts & Serg.* 122; 1 *Watts & Serg.* 297, 128; 2 *Watts* 66.

The opinion of the Court was delivered by

ROGERS, J.—The facts of the case are so imperfectly stated, that the application of that part of the charge which relates to the first error assigned is not very obvious. The plaintiff's title, as we understand it, depends upon the Act of Limitations, and on that point the court in substance instruct the jury that residence is not necessary to make an adverse possession; that where land is enclosed and cultivated, it may be adverse so as to give an indefeasible title to the occupant. And in this position the court is sustained by *Johnston v. Irwin*, 3 *Serg. & Rawle* 291). But the charge is predicated on the hypothesis that the plaintiff has marked his boundaries; for without some designation of the extent of the claim, either by a private or official survey, user of the property as an entire tract or payment of taxes, a disseisor obtains title only to the part cleared and cultivated. The court say, "if the jury believe that James M'Ginnis went upon the land in 1807, and defined his boundaries so as to embrace the *locus*, and continued

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with those claiming under him to occupy it in the manner stated by the witnesses, for a period of more than twenty-one years, the title under the Franklin College is barred by the Statute of Limitations, provided James M'Ginnis had only as much land within those boundaries as he could hold by settlement and improvement. If he sold part of his claim to his son, James Johnston M'Ginnis, in 1815, and procured a warrant and survey for the residue, for himself, a family residing on the warranted tract would be a sufficient actual possession of the whole tract, if the clear land was continued to be cultivated on both parts of the tract annually, by James M'Ginnis and James J. M'Ginnis, or others for or under them, during the said period of twenty-one years.

But granting the charge to be correct, there is no evidence that I can discover that James M'Ginnis defined his boundaries when he entered on the land in 1807, or that there has been any designation of the extent of the claim by James Johnson M'Ginnis since his purchase in 1815. But this ought to be shown clearly where he intends to extend his title beyond his enclosures, and to bring his case within the principles decided in *M'Call v. Neely*, (3 *Watts* 70); *Crisswell v. Altemus*, (7 *Watts* 581); and *Bell v. Hartley*, (4 *Watts & Serg.* 32). So, as the cause goes down for another trial, it may be well to inquire whether the principles settled in the cases cited apply where the disseisor does not reside on the property disseised, but on another tract; or in other words, whether a non-resident disseisor acquires title by the Act of Limitations to more land than is actually enclosed and cultivated. This is believed to be a new point, about which it would be premature to express an opinion.

The court further instructed the jury, "that if they believed Benjamin Junkin, when the sheriff's sale was made of the land alleged to be Robert M'Ginnis's, and who now claims the land by virtue of the sheriff's deed, gave notice that Robert M'Ginnis had no title to it, but that he (Junkin) was the owner, and that he became the purchaser under these circumstances, he is estopped from setting up that deed to defeat the plaintiff's cause of action." The property was seized and sold by the sheriff as the property of M'Ginnis, and Junkin became the purchaser, after having given notice that M'Ginnis had no title; but in this we see nothing which estops either Junkin or the person claiming under him from availing himself of the title so acquired; for where a person acts *bonâ fide*, there is nothing to prevent him from giving notice of the debtor's defect of title, and afterwards becoming the purchaser. A man, surely, may purchase his peace, and prefer a small sacrifice, rather than run the risk of long and vexatious litigation. It is very true that fraud may vitiate such a sale, and redress may be had by an application to the court either by the debtor or the creditors. In a proper case, the court will order a re-sale of the premises, and

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indeed, under certain circumstances of palpable fraud, no title passes to the fraudulent purchaser, as against either the debtor or his creditors. But here it must be observed, that neither the debtor nor the creditors complain of the sale, but a third person, who has not been injured, attempts to avail himself of it by way of estoppel.

Taking it in the most unfavourable point of view for the purchaser, the title can only be avoided at the instance of the debtor and creditors. It is not void, but voidable only. It cannot be alleged that Junkin was guilty of fraud, for the notice was strictly true, and, we are bound to suppose, given in good faith. Both plaintiff and defendant concede that Robert M'Ginnis, the debtor, had not a shadow of title. *Sergeant v. Ford*, (2 *Watts & Serg.* 122); *Foulk v. M'Farlane*, (1 *Watts & Serg.* 297); and *Gilbert v. Hoffman*, (2 *Watts* 66), are cases of actual fraud, and are therefore materially different from the case in hand. There is no evidence of fraud which can injure the title of the purchaser, even as against the parties in interest, much less is there anything proved which can enure to the benefit of a stranger. Knowing that the title exposed for sale was worthless, it was the duty of the owner to give notice of it, so as to put purchasers at the sheriff's sale on their guard. Nay, if he had omitted to do it, it would have jeopardized his own title. It would, therefore, be unreasonable to hold that he was estopped by an act which was only a prudent precaution, from setting up the title acquired by the purchase.

Judgment reversed and a *venire de novo* awarded.

Bowen against Bowen.

In an action of ejectment by a purchaser at sheriff's sale to recover the property purchased, the defendant cannot avail himself of any informality in the judgment and executions under which it was sold; especially if he was also the defendant in the judgment.

A father devised a tract of land to his two sons, J. and D., at a certain price, which was to form a part of his estate and be divided between his other children, and appointed J. one of his said devisees to be his executor. One of the legatees brought an action for his legacy against J., as executor, but in the declaration charged him personally and obtained a judgment, issued an execution and levied upon the land devised as the estate of the testator, and sold it: in an action of ejectment by the purchaser, it was *held*, that he was entitled to recover that moiety of the land which was devised to J., but not the other.

ERROR to the Common Pleas of *Fayette* county.

This was an action of ejectment by Alfred Bowen and William

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L. Johns against John Bowen and Isaac P. Sturges for 240 acres of land. The facts of the case are fully stated in the opinion.

Veech and Dawson, for the plaintiff in error, argued that the judgment upon which the land was sold was a personal judgment against the defendant, and not *de terris*. 4 *Serg. & Rawle* 213, 509; 12 *Ibid.* 98; 8 *Ibid.* 404; 17 *Ibid.* 298; 2 *Rawle* 185; 5 *Rawle* 137. The execution was issued against the defendant as executor, and the levy was made upon the estate of the testator, and it was advertised and sold as his estate. This would not confer any better title upon the purchaser than if the levy had been upon the estate of any third person.

Austin and Howell, contra, cited 1 *Sm. Laws* 383; 1 *P. R.* 112, 424; 2 *Watts* 209, 110; 5 *Rawle* 137; 13 *Serg. & Rawle* 14; 2 *Binn.* 298; 8 *Serg. & Rawle* 508; 1 *Peters* 273; 1 *Dall.* 481; 1 *Serg. & Rawle* 97; 2 *Rawle* 185.

The opinion of the Court was delivered by

HUSTON, J.—With some difficulty I have gathered the following statement of facts in this case. Samuel Bowen owned the land, and before his death had agreed to sell it to his sons, Davis Bowen and John Bowen, who had paid something on the purchase. In his will he devised one-half of the farm, including the mansion-house, to his widow during her life, and gave the whole farm to Davis and John Bowen, subject to her life, at the price of \$2500, out of which was to be deducted what they had already paid and what they should be obliged to pay for his debts. The widow is dead. The whole proceeds of the estate were to be equally divided between his four sons and the children of a deceased son. John Bowen was the only executor who acted. Davis Bowen and John Bowen entered on the land and became liable to pay the price. I see nothing in the will to make the shares of the legatees a charge on the land. Davis Bowen and John Bowen made partition; this is conceded on all sides; but whether into equal parts does not appear; nor is it material in this case. It seems, also, that Davis Bowen settled with some of the heirs and released his right, as I understand it, to John Bowen's part, to some of the legatees, which the Judge calls a nullity. We have nothing to do with this, or with Davis Bowen's part of the tract, more than to say, that it is agreed he had sold it, that he was not sued, and no judgment or execution against him or his vendee, and there was nothing wrong in the court saying his part could not be sold—that the levy and sale was absolutely void as to that vendee and his land.

Samuel Bowen, the testator, made his will in 1822, and it was proved in that year. John Bowen, the executor, settled an account of his administration in 1824. In 1828, Abraham Bowen,

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one of the legatees, sued John Bowen for his legatory part, and obtained a verdict and judgment in 1837 for \$501.65. The declaration in this case, in the commencement, styles him John Bowen, executor of S. Bowen. It recites the will, in its material parts; states that John Bowen got possession of the real and personal estate more than sufficient to pay the debts and legacies; that though often requested, he has neglected and refused to pay, &c. Though not a model to be followed, in some of its parts, it is good after verdict. The charge is against John Bowen personally. The judgment has never been formally drawn up, but, as is usual in our courts, the word "judgment" is entered on the docket. If an improper execution issues on a judgment so entered, it may, on application to the court, be set aside, and plaintiff's judgment will be required to be drawn up according to law, so that the prothonotary will know in what form, and against what person to issue the execution. The executions, *fi. fa.*, levy, inquisitions, and *vend. exponas*, are not before us; but, it seems, from the argument of counsel, the sheriff was commanded to levy the debt and costs of the goods and lands of Samuel Bowen, deceased, in the hands of his executor; and even up to the sheriff's deed, the property is so called, and the levy and sale was on the whole tract devised to Davis and John Bowen. Let it be noticed, this is not a writ of error to bring up that judgment and execution. In this case we cannot reverse the proceedings in that cause; they were offered in evidence in deducing the title of the plaintiffs below, who had purchased at sheriff's sale. Now it is well settled that when a purchaser at sheriff's sale is compelled to bring ejectment to recover the property he has bought, the defendant cannot defend himself by objecting to the formality of the judgment and executions under which it was sold. And much more is this the case if the ejectment by the purchaser is brought against the same person who was defendant in the judgment, as is the case here. John Bowen could have taken a writ of error, and had that judgment reconsidered here, and the execution, at least, reversed. He did not do so. The *fi. fa.*, levy and inquisition were to January term 1838, and the deed acknowledged at January term 1839: during this year Bowen is not heard objecting. The *fi. fa.* was levied on, and the *venditioni exponas* purported to sell the part allotted to Davis Bowen, and now owned by Sturges, as well as the part of John Bowen. We do not know whether the silence of John Bowen proceeded from a willingness to have his debts paid by the sale of land not his own, or from ignorance or inattention. The objection made is, that the land of John Bowen could not be sold as the land of Samuel Bowen. I have said the writs are not before this court. The arguments of John's counsel proceed on the ground that the writ commanded the sheriff to levy on the lands of Samuel; but, on more minute examination, I find the Judge, after saying that the judgment was against John, says the writ was

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correct, but the levy described the land as that of Samuel Bowen. Now it had been Samuel Bowen's, and was now, or one-half of it was, John Bowen's. Either way the Judge was right in saying the plaintiff could recover the part belonging to John Bowen. We do not say, if the land of A. is sold as the land of B., that the purchaser can recover and hold. But if, as in this case, John Bowen knew there was a judgment against him, an execution levied on his land on which he lived, and had, as he must have had, notice of the levy and inquisition and sale, and suffered the purchaser to pay a fair price, which was applied to pay his debt, he cannot, after all this notice, and these proceedings, without objection on his part, be heard to say to the purchaser; "you have paid my debts, and I have got beside that \$1000 of your money, yet I will keep the land on account of a blunder or informality in the words of the levy." The Judge was clearly right in saying, that as there was no suit against Davis Bowen or his vendee, Sturges, and no execution and no notice in law or fact to them, the sheriff's sale passed no title to their part.

Judgment affirmed.

Parke *against* Lowrie.

The relation which exists between a notary and the holder of a negotiable note, with regard to the protest of the note and notice to the endorsers, is that of principal and agent, and no more strict performance of duty is required of the former than is indicated by the uniform practice of the place where the note was protested.

ERROR to the District Court of *Allegheny* county.

James Parke against Matthew B. Lowrie. One Waters drew a promissory note dated Pittsburgh, 8th April 1839, payable to the order of Armorer, who endorsed the same to Ingersoll, who endorsed the same to Roseburg, who endorsed the same to the plaintiff, who placed the same in the Merchants' and Manufacturers' Bank for collection. The note was not paid at maturity, but placed in the hand of the defendant, who was a duly commissioned notary public, for protest and notice. The note was duly protested, after the notary had exhibited the same at the bank in Pittsburgh, and to sundry persons in the city, and he gave notice to the endorsers. The drawer did not reside in Pittsburgh, but in the county of Allegheny, and his place of residence was known to the defendant, but no demand was made of him there. The endorsers, in a suit by the present plaintiff, were relieved from their

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endorsement by the fact that no legal demand was made of the drawer; and this was an action against the defendant, who was the notary, for negligence in not making a demand of the drawer. The testimony on the part of the defendant was indisputable, that it had never been the usage, in Pittsburgh, for notaries to go out of the city to make a demand of the drawer, and the question was, whether this was a sufficient defence in this action.

GRIER (President) instructed the jury that it was, and directed a verdict for the defendant.

M'Candless, for the plaintiff in error, cited 6 *Binn.* 312; 4 *Johns.* 84; 5 *T. R.* 150; 1 *Marsh.* 298.

Lowry, contra, cited 4 *Whart.* 113; 22 *Wend.* 226, 241; 6 *Whart.* 415; 3 *Whart.* 116; 4 *Burr.* 2060: 28 *Com. L. R.* 313; 34 *Ibid.* 88; 8 *Mass.* 57.

PER CURIAM.—A protest is not necessary to charge the endorser of a promissory note; and the intervention of a notary is sanctioned, not enjoined, by the statute, which makes his act evidence of demand and notice of dishonour. When the holder, therefore, chooses to employ him instead of a private person, the law of responsibility between them is the law of principal and agent, or master and servant. It was effectively held so in *Bellemire v. The Bank of the United States*, (4 *Whart.* 105). What, then, was the defendant employed to do? Just as much as it was customary for other notaries to do; and it is not pretended that he did less. The proof was full and uncontradicted, that the usage was not to go beyond the bounds of the city. The usage was his instruction; and if more had been expected of him, he ought to have been specially directed. Had he undertaken the business on special terms, he would have been bound to the extent of them; but as he undertook it on the basis of the practice, no more than the duties indicated by the practice could be required of him.

Judgment affirmed.

Church *against* Riddle.

After the lapse of two years from the date of a treasurer's sale of unseated land, there is no title in the original owner which is the subject of a sheriff's sale, nor will such sale entitle the purchaser to recover the amount of the surplus bond given to the treasurer.

ERROR to the District Court of *Crawford* county.

Daniel Shryoch, treasurer of *Crawford* county, for the use of Gaylord Church *against* J. Stuart Riddle. The parties agreed to consider the following facts in the nature of a special verdict.

On the 6th May 1824, John Field, of Philadelphia, died intestate, leaving five heirs, (lineal decendants), of whom were Joseph and Samuel Field, and was seised of 200 acres of land in *Crawford* county, No. 44. On the 8th May 1824, letters of administration on said intestate estate were granted in Philadelphia county, to said Joseph Field. On the 11th August 1830, judgment was obtained by Joseph Clark, to the use of his assignees, in trust for the benefit of his creditors, *against* Joseph Field, administrator, &c. of said intestate, in the District Court for the city and county of Philadelphia, for the sum of \$3151.96, and costs of suit, *de bonis et terris*, &c., and on the 12th August 1830, a *fi. fa.* issued on the same, and was returned *nulla bona*, after which, on the 16th May 1831, a *test. fi. fa.* was issued to *Crawford* county, and tested on the 12th March 1831, and on the 23d May 1831, was duly entered on the *testatum* docket of said county, and the same day the sheriff of said county, by virtue of said writ, levied (*inter alia*) upon said 200 acres of land, No. 44, and returned the writ. On the 3d August 1835, on motion, a rule was granted to show cause why the levy on the *testatum* to *Crawford* county should not be discontinued, and an *alias* issued, which rule was, on the 11th September 1835, made absolute. On the 16th September 1835, by the judgment of the District Court of Philadelphia, leave was granted to issue an *alias test. fi. fa.* to the same county, tested on the 7th June 1835, by virtue of which *alias* writ, the sheriff, on the 7th October 1835, levied on the same 200 acres, No. 44, which was by inquest on the 2d November following condemned, and the writ returned. The said *alias* was entered on the proper docket of *Crawford* county, on the 23d September 1835.

On the 10th June 1836, a *vend. exp.* was thereupon issued for the sale of said levy, tested the 7th March 1836. By virtue thereof the proper sheriff, on the 19th July 1836, sold No. 44 aforesaid, to Gaylord Church, and a deed of which was duly acknow-

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ledged to him by said sheriff. On the 11th March 1832, said Joseph Field, by deed of that date, and said Samuel Field, on the 1st January 1835, by deed of the latter date, conveyed all their right and interest to said intestate estate in Pennsylvania, except in the city and county of Philadelphia, the said Joseph for the consideration of \$500, and the said Samuel of \$50, unto George Uhler, recorded in Crawford county, on the 17th January 1835, the said Joseph and Samuel being two of the heirs of the said John Field, deceased, as aforesaid. On the 11th June 1834, at the treasurer's sales of unseated lands in Crawford county, the defendant, J. Stuart Riddle, purchased the said 200 acres of land, No. 44, for the taxes of 1832 and 1833, and gave his bond for the surplus money, on which this suit is instituted, to Daniel Shryoch, the then treasurer of Crawford county, conditioned for the payment of \$204.27, being the amount of said surplus money, and received a deed for said land from said treasurer. On the 12th Nov. 1836, said Gaylord Church demanded payment of said land from said defendant, in his own right as purchaser at sheriff's sale aforesaid. of the said 200 acres of land No. 44.

Now if upon the foregoing case stated, the court should be of opinion that the plaintiff is entitled to recover the whole amount of said land for the use of said Gaylord Church, then judgment to be entered for plaintiff, &c., for the sum of \$204.27½, with interest from the time of demand, made as aforesaid, and costs of suit; but if the court should be of opinion that said Church is only entitled to recover the four-fifths part of said land, or the three-fifths part thereof, then judgment to be entered for his use for the said four or said three-fifths part thereof respectively as aforesaid, with interest as aforesaid, and costs of suit, and as for the other one or two-fifths, such judgment to be entered as to the court may seem legal. But if the court should be of opinion that the plaintiff is not entitled to recover in this case, then judgment to be entered for defendant.

THOMPSON, President, was of opinion that the plaintiff was not entitled to recover, and directed a judgment to be entered for the defendant.

Farrelly and Pearson, for the plaintiff in error, cited 1 *Dall.* 481; 1 *Yeates* 238; 8 *Watts* 124; 2 *P. R.* 95; 2 *Watts* 53; 7 *Watts* 217; 9 *Watts* 558; 1 *Watts* 301; 3 *Caines* 188; 3 *Johns.* 222; 1 *Rawle* 363; 12 *Serg. & Rawle* 12; 2 *Dall.* 205; 6 *Serg. & Rawle* 81; 3 *Binn.* 4.

Derrickson, contra, cited 4 *Watts* 341; 8 *Watts* 253; 2 *Rawle* 292; 7 *Watts* 336; 4 *Watts* 13; 1 *Rawle* 325; 10 *Watts* 405-7; 6 *Watts* 22; 5 *Watts* 287.

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The opinion of the court was delivered by

HUSTON, J.—In this case stated, two or three points were made by the counsel of the plaintiff here, though perhaps it is not necessary to consider them all in deciding this cause. John Field died on the 6th May 1824, and on the 8th May 1824, administration was granted to his son Joseph. On the 11th August 1830, a judgment was entered *de terris* (I suppose meaning to exclude all personal liability of the administrator) in favour of Joseph Clara, for \$3151.96. On the 12th August 1830, a *fi. fa.*, returned "*nulla bona.*" On the 16th May 1831, a *testatum fi. fa.* issued to Crawford county, and 23d May 1831, was duly entered on the docket of that county, and by the sheriff levied on a tract No. 44, containing 200 acres, and the sheriff returned the writ. On the 3d August 1835, on motion, leave was given to discontinue the levy on the writ on the land in Crawford county. On this part of the case something was said that the writ was not set aside. Now when the return day of a writ has passed four years, and the levy is set aside, the writ can never be levied again; it is dead, and there is no more use or effect in setting it aside than there would be if it had never been delivered to the sheriff. On the 16th Sept. 1835, by the judgment of the District Court of Philadelphia, leave was given to take out an *alias test. fi. fa.* to Crawford county, which issued tested 7th June 1835, by virtue of which the sheriff, on 7th Oct. 1835, levied (*inter alia*) on the same 200 acres No. 44, which by inquisition on 2d Nov. 1835, was condemned. This last *fi. fa.* was entered on the docket of Crawford county, 23d Sept. 1835. On the 10th of June 1836, a *vend. ex.* was issued for the sale of said levy, tested 7th March 1836, and by virtue of it the land was, on 19th of July, sold to Gaylord Church, and a deed made to him (date not given). All this, and the fact that Joseph Field sold his interest in the land to Dr Uhler, on the 11th March 1832, and that Samuel Field sold to the same, 1st January 1835, was stated to raise some question as to whether the lien of Clark against the lands and estate of John Field, had, as against the heirs of Field, expired, and cases were cited as to when this lien as against those heirs expired; whether at the end of twelve years from the death of John Field, or at the end of five years from the date of Clark's judgment on the 11th of August 1830. This seems immaterial, because twelve years from the death, and five from the date of the judgment, had expired before the sale; and because the estate of John Field's heirs was divested by a sale for taxes more than two years before the sale of this tract on the *vend. exp.* and one year and upwards before the *fi. fa.* was levied on the tract in question.

On the 11th June 1834, this tract of John Field, or his heirs, No. 44, containing 200 acres, was sold for taxes due and unpaid for the years 1832 and 1833, by the treasurer of Crawford county, to J. Stuart Riddle, and a deed executed, acknowledged and de-

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livered, and bond duly given and filed for \$204.27, being the amount which the sum bid exceeded the taxes and costs due on the tracts. An attempt was made to put this case on the same rights as if Riddle held the land by article of agreement under John Field, and part of the purchase money still due. The Acts of Assembly forbid us so to consider it. By the 5th section of the Act of 3d April 1804, sales for taxes "shall be in law and equity valid and effectual to all intents and purposes, to vest in the purchaser of lands sold as aforesaid, all the estate and interest therein that the real owner had at the time of such sale;" and by the 4th section of the Act of 18th March 1815, the owner may, within two years from such sale, tender to the county treasurer the taxes and costs for which the land sold, with 25 per cent. on the same, which the treasurer must pay over to the owner. But if such tender to the treasurer is not made, or if the owner has not paid the taxes before the sale, no action shall be supported by the owner for the recovery of the land. It then proceeds to dispense with proof of advertisement and notices, and repeals the law requiring such proof, and no alleged irregularity in the assessment, or in the process or otherwise, shall be construed or taken to affect the title of the purchaser, but the same shall be declared to be good and legal, with a saving for persons under certain disabilities. This case is then more like to that in which a man has sold in fee simple, and has obligations for part of the consideration money unpaid, in which case the purchaser of the fee simple holds the land freed from the unpaid purchase money.

It has been contended that a right of redemption remained in the representatives of John Field, which could be levied on and sold and conveyed to the purchaser. Without disputing this, it is clear that the right sold could be no greater than that which was levied. Now, an estate for years or for life may be levied on; but if the term for years is suffered to expire, or the tenant for life dies before the sale, there remains no estate to be sold; and if a sale, the purchaser takes nothing. The two years had expired before this sale; if sold within the two years, the purchaser would have acquired whatever right remained in the representatives of Field. After the two years had expired, no right in or to the land remained which could be sold on that process, and of course no such right passed to the purchaser. By an Act of Assembly bonds or debts due to the defendant in an execution may, by an attachment clause in an execution, be taken for the plaintiff; but this law must be complied with; a debt due on bond cannot be levied on and sold on an execution against land.

The fallacy of the ground taken by the plaintiff, among other things, consisted in supposing this interest remaining in Field to be a fee simple, when the fee was in Riddle, and Field's representative had no right except on the precedent condition of tendering money within two years of the sale for taxes; and those two years

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having elapsed, no Act was required to make the title of Riddle indefeasible. Lapse of time and the operation of the law extinguished the right of the former owner. The purchaser of land at a sheriff's sale, if he purchases a good title, holds the land though it turns out to be worth ten or fifty times the price for which it was sold. On the other hand, if he buy a defective title, totally worthless, he loses his money; and it was never before supposed that he could indemnify himself by seizing or claiming other lands or goods, or debts still left to the defendant. Shryoch, the treasurer, can sue only for the heirs or legal representatives of John Field, and Church is neither of these.

Judgment affirmed.

Brunott against M'Kee.

The sureties of a constable are liable for the act of the officer in levying upon the goods of a stranger.

The 86th section of the Act of 13th April 1834, relative to county and township officers, which requires them to file a copy of their official oath with the town clerk, is not applicable to a constable.

ERROR to the District Court of *Allegheny* county.

The Commonwealth for the use of Grace M'Kee against David E. Mitchell, Hillary Brunott and D. P. Ingersoll. This was an action of debt upon the official bond of Mitchell, who was constable of the fifth ward of the city of Pittsburgh; the other two defendants were his sureties. Grace M'Kee brought an action of trespass against David E. Mitchell for levying and selling her property upon an execution against another person, and recovered a judgment against him for \$68. This suit was brought to recover the amount of that judgment, and the sureties made defence on two grounds: 1. That the constable had not taken and filed with the town clerk a copy of his official oath, as required by the 86th section of the Act of 13th April 1834, and therefore his acts were void; 2. That they were not liable for acts of trespass committed by the constable. The court below directed a judgment for the plaintiff.

Williamson, for the plaintiff in error, cited the Act of Assembly referred to and 4 *Watts* 23.

Dunlop, contra, cited 7 *Serg. & Rawle* 392; 2 *Rawle* 139; 5 *Watts* 538; 2 *Watts & Serg.* 37; 5 *Binn.* 185; 17 *Serg. & Rawle* 354.

[Brunott v. M'Kee.]

PER CURIAM.—Though the Act of 1834 speaks of constables as township officers, they are not strictly so; nor does the section which requires them to file a copy of their oath of office with the town clerk, where there is one, seem applicable to them. They are nominated by the township, it is true; but they are also appointed by the court, which is not the case with any other township officer: and their duties are also of a mixed character, a part of them pertaining to the township and a part to the county. They have from time immemorial been sworn into office by the court, and there has not perhaps been a single instance in which one of them has filed a copy of his official oath with a town clerk. Why should he do so when the oath is already on record? The object of the Act was to provide a place for the deposit of the evidence of qualification; and though that might be necessary in the case of the others, it would be superfluous in the case of a constable. But the section is at best merely directory, as it does not say that the acts of the officer shall be void for want of compliance with it; for in *Kingsbury v. Ledyard*, (2 *Watts & Serg.* 37), it was held that the writ protects the officer himself: and where his act is valid it is proper that the sureties be responsible for it. But it does not appear in the case stated that there was in truth a town clerk for the township; and the defendants would be liable under any construction. The remaining argument is disposed of by *Carmack v. The Commonwealth*, (5 *Binn.* 184), in which the sureties of a sheriff were liable for the act of the officer in levying the goods of a stranger.

Judgment affirmed.

Church *against* Hampton.

In an action of assumpsit by three partners, in which the defendant pleads non-assumpsit, payment and set-off, one of the plaintiffs cannot be made a competent witness by releasing after suit brought all his interest in the claim to his co-plaintiff and paying into court all the costs of the suit which have accrued or may accrue, to the final termination of the action.

ERROR to the District Court of *Allegheny* county.

Wade Hampton, George P. Smith and William Ebbs, trading under the firm of Hampton, Smith & Co. against Thompson Church and Samuel Kyle, trading under the firm of T. Church & Co. Assumpsit brought to November term 1841. The declaration contained the common counts for goods sold and delivered, and also a count charging that Hutchinson & Ledlie had made their promissory note and delivered the same to the defendants,

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and thereby promised to pay the defendants \$675, and that the defendants afterwards endorsed the same to the plaintiffs, and that Hutchinson & Ledlie did not pay the same, although the same was presented to them for payment on the day when it became due, of all which defendants had notice. The defendants pleaded non-assumpsit, payment with leave and set-off.

The plaintiffs proved the sale and delivery to the defendants of sundry bills of merchandise. They then exhibited the assignment of Wade Hampton and George P. Smith, two of the plaintiffs, dated November 5th 1842, of all their interest in the assets of the firm of Hampton, Smith & Co. to William Ebbs, the other plaintiff, and the plaintiff paid into court \$30, which the court adjudged sufficient to meet the costs due and likely to become due. They then offered George P. Smith as a witness. The defendants objected to the witness on the ground of incompetency. A witness testified he was a clerk of the plaintiffs and their debts were principally all paid, but some very small balances in the city, William Ebbs was considered rich. The court overruled the objection and sealed an exception. The witness Wade Hampton was then called by the plaintiffs and examined.

The defendants then gave evidence of several matters of set-off and payments on account, and requested the court to charge the jury upon the following point:

"If upon a fair examination of the respective accounts between the parties, they shall find a balance in favour of the defendants, it is their duty to certify such balance to the court, and if there is no evidence of the note of Hutchinson & Ledlie having been taken up by the defendants without payment, except that of Wade Hampton, one of the plaintiffs; if his testimony is the only obstacle to a certificate in favour of the defendants, excluding from their computation the note aforesaid, they should disregard his testimony and so exclude it, he being directly interested to that amount; that his own testimony is not competent to protect himself and his co-plaintiffs from such a certificate."

The court charged the jury that if, on examination of the testimony, they found a balance in favour of the defendants, they should so certify, but as to the remainder of the instruction requested they refused so to instruct the jury, and sealed an exception.

Miller, for the plaintiff in error, cited 1 *Bailey* (S. C.) 364; 3 *Watts & Serg.* 320; 14 *Serg. & Rawle* 54; 9 *Watts* 571.

Metcalf and *Loomis*, contra.

PER CURIAM.—This action is in the name of three partners, two of whom have assigned their property in the partnership effects to the third, who is the plaintiff in interest. The defendants pleaded a

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set-off; and the plaintiff produced one of his late partners as a witness at the trial, not to rebut the alleged set-off indeed, but to sustain the partnership demand. But what if it should not be sustained to the extent of the set-off? There would be a verdict for the defendants, and a certificate of balance against the plaintiffs on the record which would involve the witness in direct and personal liability. If the demand were sustained to the extent of the set-off, he would be discharged from responsibility; and his interest, therefore, lay in sustaining it that far by his testimony. Were the position of the parties reversed—the present defendants being plaintiffs, and the present plaintiffs being defendants—it would not be thought that he might be called to sustain, as a set-off, the demand set out in the present declaration, because a failure to maintain it would involve him, as a party, in a verdict and judgment for the debt. And what is the difference between such a case and the present, in which the parties seek to enforce cross demands by proceedings in which both are actors? Instead of a verdict direct, there may be a certificate of balance against the witness, as conclusive as a verdict, and he therefore had a direct interest in the event. It is scarce necessary to remark that the refusal of the prayer for direction as to the effect of his testimony stands on the same ground.

Judgment reversed, and a *venire de novo* awarded.

Morrison *against* Morrison.

Though the terms of a sale of land by auction were in writing, and the bonds for the purchase-money were executed in pursuance of them, yet in an action upon such bond it is competent for the defendant to prove that the written terms were altered by parol, and that the parties agreed when the bond was given, that upon the happening of a certain event the bond was not to become payable at the time expressed in it.

ERROR to the Common Pleas of *Washington* county.

James Gracey, trustee of the estate of James Morrison, deceased, against James Morrison and George Morrison. This case is fully stated in the opinion of this court.

Gow and *Brady*, for the plaintiffs in error, cited 2 *P. R.* 214; 1 *H. Bl.* 218; 5 *Car. & P.* 48; 15 *Vez.* 518; 16 *Serg. & Rawle* 424.

McKennan, contra, cited 2 *Phil. Ev.* 722; 14 *Serg. & Rawle* 311; 1 *Ib.* 464; 10 *Ib.* 290; 5 *Ib.* 363.

[Morrison v. Morrison.]

The opinion of the Court was delivered by

HUSTON, J.—This cause was assumpsit on a note given by James and George Morrison, under the following circumstances: James Morrison, the elder, having died, his estate was appraised, and none of the heirs electing to take it, was sold by order of the Orphans' Court. The amount of the widow's third was \$854.33, for which the note in question was given, as follows:

"We, James Morrison and George Morrison, do hereby acknowledge to owe to David Miller, trustee appointed by the Orphans' Court of Washington county, for the estate of James Morrison, deceased, the sum of \$854.33, being the one-third or widow's dower of the said real estate; and we hereby engage to pay the same according to the terms of sale of said estate; and we further engage to pay annually, on the 1st April, to Phœbe Morrison, widow of said deceased, or her order, the interest of said \$854.33." This was dated 18th Dec. 1839, and signed by the defendants below.

The plaintiff then gave in evidence the following terms of sale:

"The highest bidder to be the purchaser on the following terms, viz: The one-third of the purchase money to remain in the hands of the purchaser during the lifetime of the widow, the interest thereof to be paid to her annually on the 1st of April. Fifty dollars to be paid in cash, and one-half of the balance of the purchase money to be paid on 1st April 1840, and the balance in two equal annual payments on 1st April 1841, and the second on the 1st April 1842. The widow's dower to be paid in two equal payments: the first on 1st April next succeeding her decease, and the second in one year from the first payment, (provided that if the widow die before the time of the payment of the last of the other payments, the interest on the dower to cease until the time of the first payment of the dower becomes due, then to continue until paid); possession to be given on the 1st April next."

The plaintiff then proved the death of David Miller, the trustee, and appointment of Gracey in his stead, and the death of the widow on the 22d Nov. 1840.

The defendants then offered to prove by William Simcox (who was the crier of the sale) and others, that the terms were read and the sale proceeded for a while and the bidding ceased; and an objection was raised that should the widow die before the other payments became due, the dower coming along with the last payments would make them too heavy. The trustee, Esquire Miller, then explained the matter, and caused to be proclaimed by outcry, that should the widow die before the last of the other payments is due, the interest on the dower to cease, and the first payment of dower not to become due until the 1st April, one year after the last of the other payments is due; that is, the purchaser to have four annual payments after possession. This testimony was objected to and rejected, and a bill of exceptions.

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The defendants then offered to prove that on the 18th December 1839, and before the notes were executed, Miller stated the terms of sale to be the same as contained in the foregoing offer; that this statement was made to the defendants and for their information. This also was objected to and rejected, and another bill of exception. The errors assigned were these two bills of exceptions.

Every honest man, in making a purchase, is careful to have his payments so arranged as that in the ordinary course of affairs, he can meet them as they fall due; and it often happens that where the price is agreed on, the sale is broken off because he who proposes to purchase is not willing to bind himself to make payments beyond what he supposes to be in his power. In this case all bidding had ceased. The apparent difficulty is obviated by a change of terms, and a higher price is obtained. To enforce the payment of that higher price, and the payment at an earlier day than was expressly agreed on, would not be honest in the seller, and a fraud and injustice to the buyer.

The question when and how far parol evidence will be admitted to explain and modify written agreements, has been much discussed, and what has been once disputed may be disputed again, and continue so till time shall be no more. In some countries one or two or three decisions of the highest court ends the dispute, but it is too often otherwise. The decisions of other courts, in other countries, are relied on, and sometimes they are not wiser than our own. Although in this country almost every one can write, yet few will undertake to write a specific contract out of the ordinary terms—and fewer still can write it so as to preclude dispute; but men can understand each other, and as long as bargains are made will confide in promises and agreements never reduced to writing. I have had some experience, and compared calculations with those who have had much more, and I believe that more than ninety-nine out of an hundred contracts made, are never disputed. I mean the terms and meaning of the contract is never denied by either party, unless, after from inability to comply, one is sued.

In *Ashcom v. Smith*, (2 P. R. 211), this court decided that where the written or printed terms of a sale are ambiguous or objectionable, the seller may alter his terms during the progress of a sale by auction. It was decided in *Christ v. Diffenbach*, (1 Serg. & Rawle 464), that what was said and agreed to at the time of the contract and of reducing it to writing might be proved by parol, though omitted in the writing. In 5 Serg. & Rawle 363, the endorsement of a promissory note (not negotiated) was held not to bind the endorser, because it was proved such was the understanding of the parties, and that it was done solely to enable the endorsee to sue in his own name, if suit became necessary. In 10 Serg. & Rawle 296, TILGHMAN, C. J. says, it has been so often decided that it is now settled, that what is said at the execution

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of the writing may be proved by parol, if denied by the party who got advantage by it. But it required more cases to settle it. In *Frederick v. Campbell*, (13 Serg. & Rawle 136), on a sale of land, it was agreed that the land should be measured and paid for at \$20 per acre; but omitted to be put in the written agreement. When the purchaser came to make his first payment and get his deed, the vendor, who had promised to have a survey made, had omitted to do it, and had a deed drawn and signed for 225 acres. The purchaser hesitated, and the vendor called witnesses that if the quantity fell short he would allow for it, and the deed was accepted and bonds given for 225 acres. On measurement it was only 200 acres, and the vendor lost the amount out of his bonds. So in *Overton v. Tracey*, (14 Serg. & Rawle 311); *Bollinger v. Eckert*, (16 Serg. & Rawle 424), and *Jones v. Patterson*, (1 Watts & Serg. 321), and many other cases.

It may be supposed that if David Miller had lived this dispute would not have arisen, and that the succeeding trustee was advised he must be governed by the papers. But the justice and truth of the case require that the heirs of the deceased should not obtain a higher price by offering certain terms, and then refuse to comply with those terms.

Judgment reversed, and a *venire de novo* awarded.

Walker against Anshutz.

An undertaker, who contracts to furnish materials and build a steamboat for another, is not entitled to the benefits of the Act of Assembly giving liens to mechanics and material men.

ERROR to the District Court of *Allegheny* county.

Samuel Walker against The Steamboat St. Louis, Augustus Anshutz, owner. It appeared by an article of agreement, entered into on the 2d of January 1843, between Samuel Walker, the libellant, and Augustus Anshutz, the respondent, that Samuel Walker agreed to construct the hull of a steamboat scow, the St. Louis, to be delivered to Anshutz sometime in the month of March ensuing the date of the contract, to be paid for at various times, in orders upon different individuals, and the balance by Anshutz's own notes, to fall due at six and twelve months after the delivery. The delivery of the boat was delayed until June, at which time she was received by Anshutz, who went on to complete her by furnishing her with an engine, and equipping her for her ultimate destination, and in this condition she was libelled for a debt due

[Walker v. Anshutz.]

to the builder, Samuel Walker, as he alleged, of about \$3000. The boat was built at Elizabethtown and delivered at Pittsburgh. The mere hull being all that Mr Walker contracted for and delivered.

SHALER, (President), on a rule to show cause why the attachment should not be dissolved, made the same absolute, on the ground that the libellant was not entitled to the benefit of the provisions of the Act of Assembly made for the relief of mechanics and material men.

PER CURIAM.—The principle which governs this case, was settled in *Jones v. Shawhan*. If I can contract with another to sell and deliver me a steamboat at a day certain, there is no reason why he should have a lien on it after having parted with the property unconditionally, whether the boat be a new, or an old one; whether it be finished or unfinished, provided it answers the description in the contract; or whether the vendor had himself purchased it or built it with his own hands. The statute was not made for such a case. Mechanics and material men may follow the product of their labour or materials wherever they can find it. But the owner of a boat, built by himself, sells it as he would any other chattel, on the personal credit of the buyer, where he expressly takes no other security. If the personal responsibility of the buyer prove insufficient, the seller has made a bad bargain, and he has himself to blame for not having taken the proper precaution; but he cannot resort to the security provided by the statute for a different class of creditors. The cause seems to have been well tried on its merits, and we perceive no error in it.

Judgment affirmed.

Thompson *against* Fisher.

The identity of a tract of unseated land sold for the payment of taxes, is a matter of fact which cannot be made to depend alone upon the name in which it is sold, or any other particular matter of description; it is error, therefore, to reject the evidence of such a title because the name in which it was sold does not correspond precisely with that of the warrantee or any subsequent owner.

ERROR to the Common Pleas of *Indiana* county.

This was an action of ejectment by James C. Fisher against Joseph Thompson for a tract of land. The plaintiff's title was founded upon a warrant granted to *John Haldeman* upon which a survey was made and returned, and a patent granted, which was regularly vested in the plaintiff.

[Thompson v. Fisher.]

The defendant gave in evidence the assessments of unseated lands in Green township, Indiana county, for the years 1822, 1823, 1824, 1825, containing the assessment to *John Halaman* of a tract of land containing 400 acres, for those years.

The defendant offered in evidence a deed from William Lucas, treasurer, to the defendant dated 23d March 1829, for 400 acres in Green township, for taxes, in the name of *John Holeman*: to be followed by proof, by John Evans, assessor for the years 1822, 1823, that he assessed the tract of land in dispute for the years 1822, 1823, in the name of *John Halaman*, and that some persons in that township called the *Haldeman* tract by that name. And further offered to show, by the duplicates, that there was no land assessed in Green township in the name of *John Haldeman*, and also to prove that, in the years 1822, 23, 24, 25, the tract of land in dispute was unseated. This offer was objected to by the plaintiff and overruled by the court, and the defendant excepted. This was the subject of the error assigned.

Foster for the plaintiff in error.

The opinion of the Court was delivered by

HUSTON, J.—We had Acts of assembly for assessing taxes on unsettled land more than a century ago, and we have had suits every year as to the validity of sales of such lands where the owner neglected to pay his taxes; and in the year 1804 a law was passed, which was intended to be so plain that a legal sale could be made. The deputy surveyors were directed to return to the commissioners the names of the warrantees in all tracts surveyed by them; but the name in the warrant was not always, nor generally, the name of the real owner. Besides this, unseated lands were frequently sold, and the owner this year might not be the owner next year. And by the 53d section of that law it was enacted that the title to the purchaser should be good, though not sold in the name of the owner. The construction of this section has been the subject of frequent adjudication. In *Luffborough v. Parker*, (16 Serg. & Rawle 351), a tract sold in the name of *Nathaniel Luffborough* was held to pass the title against the owner, whose name was *Nathan*. In that case the tract was in a part of the State where every tract was of a particular number, and the tract in question had the number appropriated to the tract of *Nathan Luffborough*; and this weighed much with me, but is not noticed in the opinion of the court. It was held to be no error to leave it to the jury whether the tract in question was sold. I pass over several cases to come to *Burns v. Lyon*, (4 Watts 363). The owners of lands north and west of the Ohio and Allegheny, being required to make a settlement on each tract, entered into agreements with individuals to give them one half of the tract, if a settlement was made. This was evidenced by written agree-

[Thompson v. Fisher.]

ments designating that the settler should have his half from the north or south, or east or west side of the tract, according to the agreement. The part of the warrant owner remained unoccupied, generally, for many years; and in 1812 a law was passed authorizing the settler's half to be taxed to him, and the remaining half taxed as unseated land, and sold if the taxes were not paid. Two hundred acres were assessed and sold as part of the tract on which J. D. was settled. Now in this case neither the name of the warrantee nor owner was given; yet the purchaser held the land, and it was distinctly decided that it must in many cases be left to the jury to say whether the land sold was that for which suit was brought. Where the land is unseated, it is the land which is taxed; the owner is not liable personally. There would be no doubt in that case. More difficulty has occurred in subsequent cases. *Hiester v. Laird*, (1 *Watts & Serg.* 245); but it was again decided that it must be left to the jury; and we have not been able to find any other standard. If the name is misspelt, or the quantity of land is mistaken, we cannot avoid a sale for that except in a flagrant case. Let it not be understood that I mean that any tract may be sold in any name; if the name is mistaken, so as not to be liable to be considered the same, there must be some other evidence to designate the tract, or it will not pass; but evidence other than the name alone must sometimes be admitted, and ought to have been admitted in this case.

Judgment reversed, and a *venire de novo* awarded.

Overseers of St. Clair *against* Overseers of Moon.

Aldermen of the city of Pittsburgh have jurisdiction to hear and determine the rights and liabilities of the townships of Allegheny county respecting the support of paupers.

If an appeal from the order of two aldermen removing a pauper from one township to another, be quashed by the Court of Quarter Sessions for want of jurisdiction of the aldermen, it is error in the court to make any decree between the parties as to the payment of costs.

CERTIORARI to the Court of Quarter Sessions of *Allegheny* county.

The Overseers of the Poor of St. Clair township against the Overseers of the Poor of Moon township. The plaintiffs applied to two aldermen of the city of Pittsburgh for an order to remove a pauper from their township to the township of Moon. The aldermen upon hearing the testimony granted the order of removal; and from this order the defendants appealed to the Quarter Sessions,

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where the appeal was quashed on the ground that the aldermen had no jurisdiction of the subject: and the court, upon a further hearing of the subject, awarded an attachment against the plaintiff for the costs, expenses, &c., amounting to \$164.76.

Mahon for the plaintiff in error.

McCandless for the defendant in error.

The opinion of the Court was delivered by

KENNEDY, J.—In this case, the order for removing the pauper from St. Clair township to Moon township, (neither of said townships being within the city of Pittsburgh), was made by two aldermen of the city; and the Court of Quarter Sessions, conceiving that the aldermen had no authority to grant the order, quashed it and the proceedings relative thereto. In this it is alleged that the court erred. The court seem to have taken up the idea that the only authority to be found on the subject, which empowered aldermen or justices of the peace to make such order of removal, was contained in the 22d section of the Act of 1771, entitled “An Act for the relief of the poor,” (1 *Smith’s Laws* 340-1); and that, agreeably to the provisions of this section, the authority to remove in such a case as the present, is given to two justices of the peace of the county exclusively. Had this case arisen between two townships within the county of Philadelphia and without the city of Philadelphia, the conclusion of the court might have been correct enough, for that section of the Act has reference only to aldermen or magistrates of the city of Philadelphia. It was the only city within the province at the time, and indeed is the only one mentioned in the Act, and as it does not by its terms contemplate the erection of any other city within its borders, it would seem to be difficult to derive any authority thence to aldermen of a city created subsequently, even to grant such an order between townships, wards or districts lying within the same. But all difficulty in this respect is removed by the 18th section of the Act of the 16th of March 1816, (*Pamph. Laws* 168), incorporating the city of Pittsburgh, which declares “That the mayor and aldermen of the said city (Pittsburg) for the time being, shall have the same jurisdiction, in *all civil cases*, as justices of the peace of the county have, and shall proceed in like manner, for the like fees and costs, and with the like powers and authorities, and subject to the like rules, regulations and restrictions.” Seeing, then, that the present case is one of a *civil* nature, and that the provision of the Act just recited has expressly extended the jurisdiction of aldermen of the city of Pittsburg to *all* such cases, to be exercised and proceeded in by them in the same manner as if they were justices of the peace of the county, it follows, as an inevitable conclusion, that the aldermen had jurisdiction of this case, and that the Court of Quarter Sessions erred in deciding that they had not.

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The Court of Quarter Sessions, further, after quashing the order and proceedings of the aldermen, proceeded to make orders directing the overseers of St. Clair township to pay costs to the overseers of Moon township, and to grant attachments against the former for the purpose of enforcing the payment thereof. These orders and attachments are all complained of as being erroneous. Several exceptions have been taken to them. First, that the costs allowed were taxed without any notice to the complainants; second, that, under the title of costs, a charge of \$106.75 is included and allowed for boarding the pauper sixty-one weeks, at \$1.75 per week; third, that the attachments were granted by the court without any previous demand being made on the overseers of the township of St. Clair, as taxed and allowed by the court. Any of these exceptions, if true, is fatal; and that the two last are true is clear.

But I am inclined to think, without intending to express an opinion by which I shall consider myself bound hereafter, that these other exceptions to these orders and attachments granted by the court, had the aldermen been without jurisdiction in the case, as the court thought, would render them at least erroneous, if not void. The case was brought before the court by an *appeal* taken by the overseers of the poor of Moon township from the order of removal made by the aldermen. But the right of appeal appears to be given, in such cases, only where the aldermen or justices have jurisdiction, but may have pronounced an erroneous judgment. If they take cognizance where they have no jurisdiction, and render a judgment affecting the rights of a party, his remedy for redress is not by *appeal* to a superior tribunal, but by writ of *certiorari*, or by action, if his person or property has been taken under the judgment, which would be regarded as void, and therefore, though unreversed, would not be considered as any bar to his action. If, then, it had been so, that the aldermen were not authorised to proceed in this case for want of jurisdiction, the natural result would have been, that no appeal lay from their judgment to the Court of Quarter Sessions, and that this court therefore could not take cognizance of the case by appeal, as it did. The only thing that the court could have done, would have been to have dismissed the case for want of jurisdiction, without more; for I doubt the authority of the court, in a case where it has no jurisdiction, to make an order giving costs to either party.

Again, not being able to comprehend, I suppose, how anything could be obtained by issuing the attachments against the overseers of the poor of St. Clair township as a corporation, the attachments were issued against them individually. This, as appears to me, was irregular, and altogether unwarrantable. By the 16th section of the Act of 1771, the overseers of the several townships, &c. are respectively created corporations, and rendered capable of suing or being sued as such; and are not therefore to be rendered

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personally responsible, when they sue in their corporate capacity, as they would seem to have done here, unless expressly made so responsible by some provision in the same or some other Act. By the 24th section of the Act, they may be imprisoned on account of costs and charges ordered to be paid by the court, provided no sufficient distress of their goods can be had to make the amount; but in no case are their persons made liable to be seized in the first instance, when there are sufficient goods to be found, out of which the amount ordered to be paid may be levied.

The order of the court below, quashing the proceedings of the aldermen, as also the orders of the court for the payment of costs and awarding attachments for not paying the same, are reversed; and the appeal of the overseers of the poor of Moon township, to said court, directed to be re-instated, and the court to proceed therein to hear and determine the case according to its merits.

Spoul *against* Ihmsen.

The Court of Common Pleas of Allegheny county has jurisdiction to try a cause which originated in the District Court, and which was certified by the Judges into the Common Pleas on the ground that one of them was related to one of the parties and the other had been counsel in the cause.

ERROR to the Common Pleas of *Allegheny* county.

Henry Spoul against Christian Ihmsen and Thomas T. Whitehead. This cause originated in the District Court, and for the reasons that one of the Judges was related to the plaintiff, and the other had been counsel in the cause while at the bar, the same was certified into the Common Pleas for trial. Upon the argument of a plea to the jurisdiction, that court was of opinion that it could not entertain the cause, and rendered judgment accordingly for the defendants. This was the error assigned.

Dunlop, for the plaintiff in error.

Forward, contra.

The opinion of the court was delivered by

HUSTON, J. — By an Act passed the 8th June 1833, a District Court in the county of Allegheny was established, and by that law a suitor could commence an action for a sum or claim of any amount in either the Court of Common Pleas or in the District Court; but it is provided that the District Court shall have no jurisdiction, either originally or on appeal, except where the sum in controversy shall exceed \$100. By the 9th section any suit or

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cause which shall be depending in the Court of Common Pleas of Allegheny county on the 4th Monday of July next, (1833), when the sum in controversy exceeds \$100, may, at the election of either plaintiff or defendant, be transferred to the District Court, there to be heard, tried and determined, provided it be so transferred within three months from said 4th Monday of July. By section 10, "If the president of the said District Court shall be interested in any suit or action which shall be commenced in or transferred to said court, or shall have been counsel for any of the parties in such suit or action, or in any matter or thing touching the same, it shall be lawful for the said president to suggest such matter or thing on the record thereof, and to direct such suit or action to be forthwith transferred to the Court of Common Pleas, there to be tried and determined in the same manner as if the same had originally commenced in the said Court of Common Pleas, or as if the same had not been transferred therefrom." Section 11. "In all suits now pending, or which may hereafter be brought in the Common Pleas of said county, in which the president thereof may have been of counsel for either of the parties in such suit or action, it shall be the duty of the president of said Court of Common Pleas to suggest such matter on the record thereof, and to direct such suit or action to be transferred forthwith to the District Court of the county of Allegheny, there to be tried in the same manner as if the same had been originally commenced in said District Court."

Now it is obvious that such suit may be for a sum less than \$100; and the 1st section of the law had said the District Court should have no jurisdiction, either originally or on appeal, except the sum in controversy shall exceed \$100; yet the District Court in such case must, under the 11th section, have proceeded to try the cause. It would not have been before that court either originally or on appeal, but under the 11th section of the law, which gave jurisdiction in such case without regard to the amount in controversy. By a law of 12th June 1839, the District Court of Allegheny was to consist of two Judges, learned in the law, each of whom could try causes." The 3d section provides, "That from and after the first Monday of July next, all suits and causes depending in the Court of Common Pleas of the county of Allegheny, when the sum in controversy exceeds \$100, shall be transferred to the said District Court, there to be tried and determined, and the *original* jurisdiction of the said Court of Common Pleas, and all civil actions where the sum in controversy exceeds \$100, shall thenceforth cease and determine, and the same is hereby vested in the District Court." Now by the 1st section of this same law the several Acts of Assembly relating to the District Court, and not inconsistent with the provisions of this Act, are continued in force until duly altered or repealed. The 10th section of the Act first cited directs all cases in which the president is interested or has been of counsel for one of the parties, to be

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transferred to the Common Pleas, and there tried and determined. In the case before us the president was interested, and the assistant Judge had been counsel in the very cause. It could not, then, be tried in the District Court. It did not come into the Common Pleas under the original jurisdiction of that court, but under the authority of the 10th section of the first cited Act of 1833, which, in the prescribed case, gives it jurisdiction of causes which did not originate before it.

The plain meaning of the 10th and 11th sections of the Act of 1833 is, that if a cause cannot be tried and decided before a Judge learned in the law, in either of the courts, such case shall be transferred to the other court for adjudication. The words "original jurisdiction," in the 3d section of the Act of 1839, are both material: a feigned issue may be ordered by the Orphan's or Register's Court, to be tried in the Common Pleas, though the amount in dispute may exceed \$100; so an issue as to the facts necessary to be tried on questions as to appropriation of money levied on execution, and perhaps other cases. There was error in the decision of the court, that it had not jurisdiction: that decision is reversed and the cause remanded to the Common Pleas, to be proceeded in to trial and judgment.

Judgment reversed, and a *procedendo* awarded.

Patterson *against* Stewart.

In an action founded on a breach of covenant against encumbrances and an eviction, the measure of damages is the amount of purchase money, with interest from the time when the vendee ceased to be in perception of the profits actual or potential, which could not be recovered from him.

ERROR to the District Court of *Allegheny* county.

This was an action of covenant by William Stewart against James Patterson, in which the only subject of dispute was the measure of damages to which the plaintiff was entitled. The defendant conveyed a lot in Birmingham to the plaintiff, on the 6th September, 1817. Previous to that time an award of arbitrators had been filed against him, which was a lien on the property sold. And although the defendant had appealed, judgment was afterwards obtained against him in court for a large amount, and the lot in question was levied on and sold with many others to satisfy the judgment, and a deed made by the sheriff to John M'Donald, Esq. on the 1st November 1822. The lots were vacant till 1831, when M'Donald's executors sold to John M'Kee, who took possession and built a house on them.

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The declaration contained two counts, one for a breach of the covenant against encumbrances, implied in the words "grant, bargain and sell," the other on the covenant of general warranty. The plaintiff contended that the measure of damages should be the purchase money and interest since the date of the deed, as the covenant against encumbrances was broken the moment it was made. The defendant contended that interest should be calculated only from 1831, when M'Kee took actual possession, because the plaintiff was not actually ousted till that time, nor liable for mesne profits previously.

GRIER (President).—It is true, as the plaintiff contends, that the covenant against encumbrances was broken the moment the deed was executed. But the encumbrance was contingent as to any actual injury to the plaintiff. It did not divest him of the possession or title to the property until final judgment was obtained, and the property levied on and sold by the sheriff. Previous to that time the damage was merely nominal; at least, if there was any actual damage, it is not laid in the declaration nor proved. But when the sheriff's deed was made, the title was absolutely divested and the damage no longer contingent. The plaintiff was not bound to incur the expense of an ejectment, and might justly abandon all claim to the property. From that time, then, he is entitled to interest on his purchase money.

M'Candless, for the plaintiff in error, cited 3 *Caines' Rep.* 111; 4 *Kent's Com.* 471; 8 *Serg. & Rawle* 166.

Metcalf, for the defendant in error.

PER CURIAM.—We think the principle of the District Court right, and we adopt it. By the breach of a covenant against encumbrances, the purchase money becomes instantly revendicable, with interest, except for any time during which the purchaser may have been in the perception of profits, actual or potential, which could not be recovered from him. In this instance, though the covenant was broken at the sealing of the deed, the conveyance nevertheless vested the exclusive ownership in the purchaser till it was divested by the sale on the encumbrance, and to the profits, in the mean time, the incumbrancer could make no pretension. But as the purchaser's possession had been legal and not actual, it was extinguished by the sheriff's conveyance along with his seisin, of which it was an incident. From that time the use of the purchase money in the hands of the vendor was without an equivalent; and the original vendee became entitled to interest for it in the shape of damages.

Judgment affirmed.

Devall *against* Burbridge.

Partners must act with good faith towards each other, and if one of them be served with process in action against the firm, and judgment be obtained and execution levied upon the partnership property, it is his duty to give notice of it to his co-partners; and neglect to do so subjects him to an action.

There is discretion to be exercised by a court as to the time when evidence may be given, but it should not be entirely rejected on slight grounds.

ERROR to the Common Pleas of *Green* county.

William Devall against James W. Burbridge. This was an action on the case. This cause was once before in this court. See *4 Watts & Serg.* 305, where it is fully stated. The statement of the facts now made by his honour who delivers the opinion of the court, renders any other unnecessary.

Deford, for the plaintiff in error.

Biddle, for the defendant in error.

The opinion of the court was delivered by

HUSTON, J.—In 1838–9, a steam-boat was built, owned by J. W. Burbridge & Co., J. W. Hielman & Co., Wm. Devall, Joseph Sedgwick, Samuel Sedgwick, Thomas Alfree, Thomas Hughes, Michael Shosnyder, William Walton and John Allison. By July 1840, it would seem, several of these had sold to Burbridge & Co., Hielman & Co., Ingraham; and we do not see in the cause who besides those named and Devall, had any interest. About that time the boat, which cost above \$7000, was levied on and sold for \$900 at Pittsburgh. Devall lived up the Monongahela, as did several of the original partners. Burbridge lived in Pittsburgh. This suit is an action on the case, alleging in substance that Burbridge had the care and management of the boat, the employment of the hands, and receipt and payment of demands, and so being agent, suffered the boat to be levied on for a small debt and sold for a small sum, he having funds in his hands to pay the debt; and for fraud and negligence in the matter.

This case was in this court before (See *4 Watts & Serg.* 305), and remitted to the Common Pleas. That court had decided that on the plaintiff's evidence he could not recover. This court thought the cause ought to have been submitted to the jury, and on the facts proved there might have been a verdict for the plaintiff. Some evidence then given was rejected, and much was now given by the defendant, and some by the plaintiff, more than at the

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former trial. In an early stage of the trial, the plaintiff proved the service of a notice on the attorney of the defendant, to take the deposition of William P. Walton. The deposition was taken on the 7th February, and filed 12th May. The trial came on the 13th June. The deposition was rejected because the deposition was not filed in a reasonable time.

The next bill of exception is to a question put by the defendant to Wm. Ingraham, who had related many circumstances relating to the sale of the boat, and his own subsequent purchase and sale again to Burbridge and Hielman & Co., of the same number of shares which they had owned before the sheriff's sale. There was no error in permitting the question to be put and answered. The plaintiff had proved that he paid to defendant for the boat, within a month before the sale by J. Sedgwick, \$100 and a note at 60 days for \$100, (we do not hear that this note was not available,) and \$150 immediately before the sale. The defendant had called his clerk to prove that on the 9th July, before the time of sale, the boat owed Burbridge \$346. The plaintiff after this offered Shosnyder to prove that Dogherty, clerk of the boat, had paid money, and how much, to Burbridge, and when and how the witness knew it. This was objected to as testimony in chief and rejected. In the trial of this cause half or more of the witnesses were called and examined twice, some of them oftener. The plaintiff began and made out a case as above. The defendant, I suppose because he thought it best to secure himself, showed a debt to himself which would absorb most of the money Devall had sent. The plaintiff then offered to repel this by proof that Burbridge had received other money from the boat not accounted for: to be sure the offer was awkwardly made, "to prove how much he had received and when," instead of a precise sum and definite time. Both parties have spoken of the witness called (Shosnyder) as a most respectable man. It might have been offered in the earlier stage of the cause, but it was now called for by what had just been sworn to on the part of the defendant, and ought to have been admitted. There was no allegation that the witnesses were gone away, and it does not tend to the due administration of justice to be too rigid as to the time and place of calling a witness. It went strictly to repel the effect of what the defendant had just proved. There is a discretion in a court as to the order of receiving testimony; but it must be a strong case which will allow a court to reject evidence because not offered at the right time, which may be decisive of the merits of the case. Devall had been told by one of those who was or had been a joint owner, that Burbridge had said he would let the boat be sold unless money was sent. He sent money, and Burbridge applied it to pay an alleged debt to himself due by the boat. I do not admit that he had a right to do so; but surely it was allowable to

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the other party to give evidence to show there was nothing due to Burbridge. There were, as it often happens, two matters to be considered in the decision of this case: was Burbridge liable at all; and if so, for how much? Any body will allow that if he had funds to discharge the execution, the jury may and ought to give more than if he had none. There was error in rejecting this testimony.

After the testimony was heard, the plaintiff requested the court to charge the jury:

1. That if the jury believe from the evidence, that the defendant has been guilty of fraud in putting the steamboat Royal in jeopardy, in order to have a sale made so as to obtain an interest in her on better terms, they ought to find for the plaintiff.

2. If the jury believe the defendant, J. H. Burbridge, was the agent of the plaintiff, and did not keep him regularly advised and notified of the state of his interest in the boat, not only of the suit, but also of the judgment, levy and sale, he is liable to the plaintiff in this action.

3. The jury, if they find for the plaintiff, may give damages beyond the value of plaintiff's interest in the boat.

The court reply affirmatively to all the plaintiff's points, and add, "but we must observe on the 2d point, that it assumes the fact that the defendant was the plaintiff's agent, and we have not *been able to see any proof of special agency*, and it would be error in the court to submit it to you to find a fact without evidence. The defendant was a part owner, and had three times greater interest than the plaintiff in the boat. The boat was left at Pittsburgh, where the defendant lived; the other owners lived in this (Green) county. The debts were principally at Pittsburgh. It was natural therefore, probably inevitable, that the defendant should, after the boat was laid up, have greater charge over her, and greater agency in settling the debts, than the other owners. There is no evidence of any other agency than that which arose from the relation of joint owner. We must also remark on the 1st and 3d points, that fraud is never to be presumed, but must always be proved, and the proof ought to be clear and satisfactory." It is alleged there are several errors in this.

It is always pleasant to a judge to find what is his own opinion already settled by high authority. In 2 Kent's Com. 612, we find "agency is founded upon a contract either express or implied, by which one of the parties confides to the other the management of some business, to be transacted in his name or on his account, and by which the other assumes to do the business and to render an account of it. The authority of the agent may be created by deed or writing, or verbally without writing; and for the ordinary purposes of business and commerce, the latter is sufficient. *The agency may be inferred from the relation of the parties and*

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the nature of the employment, without proof of any special appointment." I presume by the words "special agency," the judge meant "special appointment of the defendant as agent;" but either way, it is equally the duty of a general or special agent, and whether by direct appointment or agency "to be inferred from the relation of the parties and the nature of the employment," to give notice of such an occurrence as a suit and judgment and levy and advertisement of the property. Even in case of partnership in a store, where one is in possession and transacting the business, and the other at a distance of 60 or 100 miles, I should suppose no judge would say there was no negligence in omitting to give the absent partner notice; and if we add to this that the partner on the spot went bail for the price of the purchase and paid it, and if not on the same day certainly very soon after became again owner of the same interest that he had before the sale: if all this resulted in a loss of his interest to the absent partner and a gain to the other, it would be difficult to find a court or jury to sanction such conduct. The answer in this respect is incorrect. The partner on the spot has in law a right to act for all generally, but where, as in this case, there were many partners, it is not a great impropriety in language or law, to speak of him as agent of the distant partner. The expression that "fraud is never to be presumed, but must be proved," though often used when addressed to a jury, has led to much individual injury, and when it is added, "and the proof must be clear and satisfactory," is calculated to mislead many jurors. They understand it that the proof must be direct, and by witnesses who were present and heard the dishonest action planned, and saw it carried into effect. Such a case seldom occurs. The design is kept secret, and the fraud is proved from circumstances. To be sure it is not to be inferred from slight grounds. Murder is not proved in one case in ten by witnesses who saw the person slain, and yet the murderer seldom escapes punishment. If facts and circumstances are proved which could not have happened if the accused was innocent, a jury convicts. Theft is always secret, yet the thief is convicted on proof which satisfies the jury that he stole. The fraudulent man seldom tells his plan or consults any but his partners in the fraud as to the mode of effecting it, yet a jury may find there was fraud even if the secret partners are called as witnesses and swear there was no fraud. But this is not to be done lightly. Every thing proved, and all fair inferences from what has been proven, are to be carefully considered and weighed; the verdict ought to be the result of full conviction, and it would be well that a judge should explain this, that fraud is not to be presumed but proved, so as that it will not mislead.

The judge, after answering the points, gave a general charge to the jury, almost every sentence of which is excepted to as er-

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ror. The charge begins by stating that the defendant is his *agent for reward*, and recites the substance of the declaration, and repeats that there was no proof that the defendant was the plaintiff's agent, "*we think*." This cause goes back again to be tried, and the deposition, or if he is living and has returned to the state, his testimony, will prove that Burbridge told him he had got authority to manage the boat from so many of the owners, and among the rest from Devall, as to give him the control of the boat, and on this assertion Walton gave him a written authority from himself; and it is in proof in this cause, that after this he appointed the captain and clerk, and when the water got low she was left in his care. There will then be an end of the assertion that there was no authority or agency beyond what arose from being partner, and an increased responsibility for not giving notice. That he told one of the former partners at some time, but we do not know when, that if the partners did not pay up he would let the boat be sold, is proved by that partner; but it is not proved that he told him to inform Devall, or that he told him a suit was brought or a levy made on the boat; and that partner swears he knew nothing of this until he came to Pittsburgh, three days before the sale. I must take it the note for \$100 has availed; if so, the plaintiff had paid to the defendant all the money he received before the sale, although this, as to part, is denied. The court ought to have left the credit of the two witnesses as to this fact to the jury. As to the \$140 which was to have been collected in Green county, that will be, I suppose, more clearly explained at the next trial. The plaintiff's counsel say the debtor was notoriously insolvent. It is a little remarkable that although this cause was argued with great ability, yet there is, in many parts of it great uncertainty as to the time when things were done and spoken.

I have said this suit may be supported on negligence in not giving notice; but for this alone the damages might be small, and the great point in the cause is fraud in the defendant: whether he had funds and let the boat be sold, or even if he had none, procured her or connived at her being sold at an undervalue without notice to plaintiff. Within two days of the sale, his clerk returned from a journey through Green county, and no letter nor message to Devall was sent by him. The fact that although Wilson's clerk bought the boat, we do not hear of his paying the overplus, after the payment of Wilson's debt to the sheriff; that almost immediately Burbridge and Ingraham and Hielman & Co., all former owners of parts, became sole owners; in fact, the whole material facts in the cause are stated, and the law arising from them, by the Chief Justice, in the opinion (4 *Watts & Serg.* 305) when the cause was here before, and I refer to that as the present opinion of this court, and would advise the judge who

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tries the cause to refer to it as his guide, unless an essentially different state of facts shall appear at the next trial.

Judgment reversed, and a *venire de novo* awarded

Keller *against* Clarke.

The mere omission of a constable to return his execution within twenty days does not fix him for the amount of the debt, if he have sufficient reason for the delay.

ERROR to the Common Pleas of *Somerset* county.

George A. Clarke & Co. against Simon Keller. The plaintiff having obtained a judgment before a justice on the 29th March 1842, issued an execution thereupon and put it into the hands of the defendant, who was a constable. On the 18th April, which was the return day of the execution, the constable arrested the defendant, who gave bond and was discharged under the Insolvent Law. On the 19th April the constable returned his execution with the prothonotary's discharge of the defendant. Upon this state of facts the court below was of opinion that the plaintiff was entitled to recover the amount of his debt from the defendant, because he had not returned his execution within twenty days: and so instructed the jury, who rendered a verdict accordingly.

Cox, for the plaintiff in error.

The opinion of the Court was delivered by

HUSTON, J.—The 12th section of the Act of 26th March 1810 directs the justice, on the delivery of an execution to a constable, to state an account on his docket of the debt, interest and costs, “from which the said constable shall not be discharged but by producing to the justice on or before the return day of the execution, the receipt of the plaintiff, or such other return as may be *sufficient* in law.” After showing how process may go against a constable in default, it directs what shall be done at the hearing: it says “if the constable refuses, on the day mentioned in the summons, or *does not show sufficient cause* why execution should not issue against him, then the justice shall enter judgment,” &c.

In this case before us on the paper-book no evidence was received, because, if received, it would not have availed the defendant. Judging from the expressions of the Judge, an omission

[Keller v. Clarke.]

to make return is an incurable default, which nothing will excuse; it has the effect, in all cases and under all circumstances, of fixing the constable for debt and costs. The law is not so. The important part of the constable's duty is to levy the debt of defendant's goods, or, if no goods, to imprison the body; and this last has been found so useless to the plaintiff, and oppressive to the debtor, that it is abolished. If the constable has performed this duty, it is important that he shall pay the money levied. Hence the law requires a return of his execution; but if he has already paid it to the plaintiff, it is not a great crime to omit his return for a day or two. If the plaintiff would ask a summons for the constable in such case, and no justice of the peace has a right to issue one until it is asked, and seek to recover his debt a second time, no principle of law or justice will permit it. In *2 Watts & Serg.* 229, this is expressly decided by this court; and it is there said; "several cases have decided that the constable, notwithstanding he has failed to comply with the first part of the 12th section of the Act of 1810, may show, under the latter part of the same section, that there was 'sufficient cause' for his not doing so." It would not be difficult to state many reasons which would be a sufficient excuse; especially where the constable has done all that he was bound to do. In this case he had arrested the defendant and carried him to the county town, and would have imprisoned him, had not the prothonotary or a Judge taken him out of the constable's custody. The plaintiff had no cause of complaint against the constable; and even that it was a very inclement day, or that he could not go to the house of the justice and home without riding until midnight, was sufficient cause, in such a case as this. Let it be understood that I do not speak of a case of wilful neglect of duty—of a case in which, if the plaintiff had known the facts, he could have secured his debt; but of a case where the constable has done all he could do—all that the plaintiff or the law required of him. If the constable neglects to return his execution, and the plaintiff demands and obtains a summons for him, the constable must pay the cost of that summons, unless in a clear case. But where the execution is returned before any process against him, there is no law nor reason why he should pay the debt of another man, unless he has omitted something which his duty required.

The execution is to be returned on or before the day mentioned in it, and if the constable has received the money or put the defendant in prison before the return day, he may make his return before that day; but where he has to take the body in default of goods, what would the Judge say to a constable who returned his execution before the day, and, in going home, met the defendant, and could have arrested him? Or, what would he have said if the constable had returned that he saw the defendant on the last day, but did not arrest him, because he had not time to take him

[Keller v. Clarke.]

to prison and return to the justice's that day? The case of an escape on a *ca. sa.* is strict, and often hard law; in all other cases a sheriff is not liable for the debt and costs, unless for neglect of something more important than the omission to return his writ on the proper day. If a constable has done or omitted to do any act which injures the plaintiff, let him answer for it; but it is not every case of omitting to return an execution on the day which subjects him to payment of debt and costs. The law saves him, where there is sufficient cause.

Judgment reversed, and a *venire de novo* awarded.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM 1844.

Grandom's Estate.

Testator desired his executors to pay a certain sum of money to a benevolent society, if any existed, to alleviate the suffering of the most prudent poor but not the intemperate, in procuring food, clothing and other necessities which such persons want in winter. A society whose objects were the promotion of the temperance cause by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor, of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage, *held* not entitled to the legacy.

It is not important that a list of charities referred to by the testator in his will was no part of the will, and that it was not admitted to probate as testamentary. A Chancellor would regard it as controlling the discretion of the executors in the dispensation of the charities.

APPEAL by the Philadelphia Temperance and Benevolent Association from the decree of the Orphan's court of the city and county of Philadelphia in the matter of Hartt Grandom's estate.

Hartt Grandom died in 1840, having by will dated the 21st July 1833, and proved the 28th November 1840, devised all his estate to John Hart, John S. Hart and Samuel R. Simmons, to have the whole at their disposal. The will contained the following clause: "In order that my executors may have information

[Grandon's Estate.]

relating to my estate, and my views as to a disposition of it by them, a list, &c. will accompany this; (this list, however, is for their use, and no part of this will)." He then appointed them executors. The list, which was filed in the register's office with the will, was as follows:

Philadelphia, July 16th 1834.

ESTEEMED FRIENDS:

1. In my will or summary devise to you, I have referred to a list relating to my views as to the disposition of my property, which I have bequeathed to you at my decease, that a judicious and beneficial distribution be made. I request you to pay all claims for collateral inheritance, or other tax that may be due, before any other payments; and that the entire sum be paid to those I have bequeathed; for I think it will be most agreeable to those who receive, and less trouble to you: then as follows, viz.
2. Philadelphia Society for the Establishment and Support of Charity Schools \$3000. Pennsylvania Colonization Society \$2000.
3. Young Men's Colonization Society of Pennsylvania \$1000.
4. House of Refuge \$3000.
5. Philadelphia Dispensary \$1000.
6. Northern Dispensary \$1000.
7. Southern Dispensary \$1000.
8. Pennsylvania Society for discouraging the use of Ardent Spirits, \$3000.
9. Provident Society for employing the Poor \$3000.
10. Infant School of Philadelphia \$2000.
11. To such infant schools which may be established in the city or county of Philadelphia at my decease, I appropriate \$2000, to be judiciously apportioned among them by such prudent persons as are acquainted with those institutions.
12. To each of the following named persons, if living after my decease, (but not to their heirs), viz., Abigail Barker, of Burlington, \$4000; (I would suggest that this sum be invested in a life annuity.) John G. Simmons \$1000 dollars. Hannah Churchman \$500. Margaret Churchman, \$500. Deborah Newbold, \$250. Mary Borton, (formerly housekeeper), of Chester county, near West Chester, \$500. Susan Plankinhorn, daughter of John Plankinhorn, deceased, \$500, for to be invested in a life annuity.
13. To each of the following named persons, or their heirs, or legal representatives, viz., Hartt G. Coates, of Chester county, \$2000: I hope he will conduct with propriety, and make a proper use of this bequest. Thomas H. Powers \$2000: I hope Thomas will not enter largely into business, so as to risk and lose what he has or may receive. Sarah Churchman, widow of Mordecai Churchman, \$500. Ruth Litle, daughter of John James, \$1000. John P. Ware, of New York, \$500.
14. To the children of Richard Ware,—except John P. Ware,—who are of suitable age, I request you to pay each \$100, and also

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a like sum to the others, as they arrive at suitable and more mature age.

15. Mary Pearson, No. 16 north 6th street, I wish you to pay, at different times, as may be suitable for her and sister Martha, assistance, what you think will be proper, in addition to the rent which they receive from the front room, which they let as a store. This house and lot was intended for Mary Pearson, by brother, who put her in possession of said property, but omitted to make her the proper conveyance; and since his decease has been claimed by the Apprentices' Library Company, who I conceive had no just claim to said property. Cousin John Hart can explain the subject, and I wish you to be liberal, as they are both weakly, and Mary far advanced in life.

16. Elizabeth Hooten, my housekeeper, if she continues in her present situation until my decease, I wish you to pay her \$2000. If cousin Catherine Sheppard, Lydia Hart, and Rebecca Simmons survive me, I wish you to give each of the survivors \$500, to be disposed of as they think proper, for charitable, benevolent and other useful purposes.

17. I wish you to convey either to an incorporate or to a benevolent society, [but if no such institution exists, I would like you and some of our friends to select some proper persons, and make a transfer to them, in trust, of all the ground-rents I may own at my decease, and other property that may be the most suitable, so as to make the clear and annual income about \$1500, which is to be an annual, permanent fund, for] to alleviate the most prudent of the poor, (but not the intemperate), in procuring fuel, clothing and other necessities, which such persons want in winter. The income is only to be expended, but the principal is not to be lessened, but to remain a regular annual income for said purpose.

18. I have long desired that a society was established in this city, and the members composed of discreet persons, and who feel interested in the moral and religious welfare of those young men who arrive at manhood, and want assistance for to commence their various vocations which they have learned, their parents are not able, or unwilling, for to aid their children, and they sustain a loss.

19. For to commence such useful and beneficent an institution, I feel as though it was my duty to make a commencement, and for that purpose I direct, that if an incorporated or other society be formed at my decease, or within one year after, and such as are approved by you, and other proper persons whom I wish you to consult, and which embrace my ideas or views of this subject, that a conveyance be made, either of real or personal property, worth about \$20,000. I hope this sum will be sufficient for some suitable incorporated society, or a society formed for the purpose, to take charge of this bequest; it will be of use to many young men of future generations; and I am in hopes it will induce others to remember such an institution. I feel the importance of this

[Grandom's Estate.]

bequest, which I believe arises from pure motives, and I hope it will be patronized by religious and proper persons, for I suggest no plan but my own idea or views of the subject, which I have to leave to the judgment of the society, whose collective judgment will be better than if trammelled by my directions. I am in hopes that much good may be done by proper persons, in aiding this useful part of the community, though the sum given may be small; but if the friends increase they will be more generous. I feel much interest for the moral and religious and temperate advancement of the young men of our city who are commencing business.

20. To each of the children who are living at my decease, of Catherine Sheppard, John Hart and Stephen Simmons, and to Elizabeth Gummere, (if she survive me), I wish you to give \$100 to each of them, as a mark of respect.

21. My old friends and associates, who were in the employ of the Bank of Pennsylvania before my resignation, seem now near to me, and I think some assistance should be given to those who may be in need at my decease. My particular friend Joseph Trotter, will, I presume, inform you of such, and aid my views relating to this subject; and I suggest, if it should be thought necessary, that a sum be given to him, or some other suitable person,—in case of his death,—for said purpose, and to be distributed as he may judge best, without mentioning their names, or hurt their feelings.

22. I give to each of my executors (in addition to their commissions) \$1000; and to cousin Stephen Simmons \$1000; and I wish you to consult him generally on important subjects; though he has lost his sight, yet his judgment is estimated by me, and I sympathize with him in this affliction.

23. I should like you to open an account, as my executors, in one of the banks, and make regular deposits of what may be received, and all payments to be made by checks on the bank. This is the most common way of settling estates, and generally gives the most satisfaction.

24. The residue, after a reasonable time, I suggest that it be divided among the many useful and benevolent societies or associations which have not been named by me; and for that purpose, if you were furnished with a list of such institutions as was suitable, in order to make a proper selection, it would be done to more satisfaction. The sum for your distribution will be large, and I should like as much good be done with it as possible, and in such a way as to give the most satisfaction; on conferring with some of the managers of those public institutions, they will aid you in the matter, and the opinion of some of the most prudent would be desirable.

25. I hope, my dear friends, you may experience a degree of the feeling which I hope is felt by me, and which is no ordinary feeling, but wisheth the happiness of all the human family; it has an

[Grandom's Estate.]

attendancy to calm the mind ; I hope you will experience the same (may I not say divine) feeling, and a satisfaction in your minds, to which no sorrow will be added.

26. I have used freedom of expression without fear ; for the subject is serious to one situated as I am ; but I am in hopes,—as my health is good,—you may not see this communication, but it seems proper to be prepared ; that in that awful time when our dissolution may take place, we may not be troubled with temporal concerns. I am, with respect and esteem, your real friend,

HARTT GRANDOM.

John Hart, John S. Hart,
and Samuel R. Simmons.

On the 4th February 1842, Samuel R. Simmons, surviving executor, filed his account, at the foot of which he appended the following statement and declaration, as sole and surviving legatee and devisee under the will :

“ This accountant found, with the will of the testator, a letter of instructions dated July 16th 1834, expressing the wishes of the deceased as to the disposal of the property. The executor felt it to be his duty to file that letter in the Register's office with the will, and desires that the property left by the testator may be distributed as nearly in conformity therewith as circumstances and the law will admit, and submits the same to the decision of the Orphans' Court for the city and county of Philadelphia, as the proper tribunal having jurisdiction of the subject. So far as the said letter of instructions designates the persons to take and specifies amounts to be received by the objects of the testator's bounty, there is no discretion to be exercised by the surviving legatee and devisee in aid of the jurisdiction of the court. So far as the objects and amounts are indeterminate and referred to his discretion, he respectfully submits the following suggestions to the court as containing his recommendations, and if necessary to be so considered, his decision in relation to them, subject to the confirmation and decision of the court, viz : 1st. For Mary Pearson and sister Martha, that \$9000 should be invested to yield them an income during their joint lives and the life of the survivor of them, and then the principal to go into the residue.

2d. For the ‘ Grandom Institution,’ incorporated by the State of Pennsylvania, by Act passed 23d April 1841, which is approved by me and such persons as I have thought proper to consult.

1st. For the object therein first expressed :

All the ground rents, deducting taxes, leaving an income of about \$450 at a valuation of	\$7,500.00
State Loan invested by me with this object in view	8,000.00
And other property or money to the value of	9,500.00

\$25,000.00

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2d. For the object therein secondly expressed :

Two houses corner of 7th and Sansom streets, worth	\$11,500.00
Cherry street house	4,500.00
Union street property	3,000.00
Other property or money	1,000.00
	\$20,000.00

To Joseph Trotter, for testator's old friends and associates in the Bank of Pennsylvania, \$2000.

And as from the great change that has taken place in the value of stocks, the residue of the estate, if any, will fall greatly short of the expectations of the testator, the said legatee and devisee, at this time, forbears to designate the "Benevolent Societies and Associations" to take the same until such residue shall be ascertained and the period arrive for its distribution; and to guard against any failure of the trust from his present omission, it is his intention to declare the object by writing in the nature of a will, which he trusts may effectually carry out the benevolent purposes of the testator, in case the same should not be completed during the lifetime of the surviving legatee."

The Philadelphia Temperance and Benevolent Association claimed to be legatees, entitled, under the 17th item of the list, to the legacy of \$25,000; but the court below rejected their claim. This association existed at the testator's death. Its objects are declared in the 2d article of its constitution, as follows:

"The object of this association shall be the promotion of the temperance cause, by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage."

To show, however, its character, the following documents were produced :

Deposition of W. W. Perrine.

I have known the society from the fact of being one of its stewards. I am not a member, and have no interest in the result of their claim under the will of H. Grandom. The society was formed in December 1839. The main and chief object of the society is the relief of the temperate poor. This has always been its object. I am not aware of the society distributing temperance pledges, except so far as such distribution is auxiliary to the fundamental object of those who formed the society. Our constitution confines us in the distribution of our charities to the temperate poor; and in order to make it perfectly satisfactory that the character of the applicant will bring him within the requirements of the constitution, we sometimes require a pledge, and in this way a pledge may have been circulated; but it is by no means

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essential that the objects of our charity should be a member of this or any other society, although we never give to any but to the strictly temperate. While a member of the society I was steward of district No. 5. In 1840 the whole amount of money I distributed was \$59. The number of families supplied with food, fuel and other necessaries, were thirteen. The number of individuals in these families were 48. In the winter of 1841 we made a female auxiliary society in my district. I think, through the aid of this society, we have done more good than in 1840. Our society bears a good comparison, as to its objects and operations, to the Union Benevolent Association, except that our charity is restricted to the temperate poor. We have physicians in each district as well as stewards, whose duty it is to attend the sick. The certificate, such as the one annexed, of an individual being a member of some temperance society, merely supersedes the necessity of our inquiring into the character of the individual as to his use of intoxicating drinks. It is not essential. I have been steward since the formation of the association.

Cross-examined.—I resigned in May or June last, in order to be examined in relation to this matter. I have no expectation of joining the society. I have done my share of labour.

*Certificate referred to in the above deposition.**

Philadelphia, March 2, 1840.

This is to certify that Massey Cooper resides in district No. 5, and is a member of the Temperance Beneficial Association, Western Branch No. 2, in good and regular standing, destitute of the comforts of life and in a suffering condition, and by reason of health has no claims on the funds of said association.

ELIZABETH TOOL, *Steward.*

B. B. LOXLEY, *President.*

WM. BARGER, *Secretary.*

To Wm. W. Perrine, Steward of the Philadelphia Temperance and Benevolent Association, district No. 5.

Constitution of The Female Auxiliary Society, referred to in and annexed to the above deposition.

Art. 1. This society shall be called the Female Benevolent Society of the North Western portion of the city of Philadelphia, auxiliary to the Philadelphia Temperance and Benevolent Association. (Bounded on the East by Delaware Seventh street, and on the West by the Schuylkill, and on the South by Chesnut street, and on the North by Vine street.)

Art. 2. The objects of this society shall be to make clothing for the relief of the worthy and suffering poor, who do not use intoxicating drinks as a beverage.

Art. 3. Sec. 1. The officers of this society shall be a first and second directress, a recording and corresponding secretary and

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treasurer. Each member of the society shall be a member of the board of managers.

Sec. 2. It shall be the duty of the first directress to preside at all the meetings of the society; to keep order, and to have a general supervision of the doings of each meeting. In case of her absence, the second directress to preside; or if both be absent, a directress *pro tempore* to be appointed.

Sec. 3. It shall be the duty of the recording secretary to attend all the meetings of the society, keep a full and fair record of all of its transactions, to register the names, to call the roll and enter the names of those absent.

Sec. 4. It shall be the duty of the corresponding secretary, when ordered by the society, to make application to the Philadelphia Temperance and Benevolent Association for aid, and attend to any other correspondence the society may require.

Sec. 5. It shall be the duty of the treasurer to attend each of the meetings of the society, to receive and to hold all the moneys and goods, the property of the society, and to render an accurate report of the same whenever called upon so to do by the society, provided she has a week previous notice to that effect; and to answer or pay all written orders for money or goods drawn on her by the society, signed by the first directress and countersigned by the secretary; and monthly to render a full account in writing of the state of the treasury, to the steward of the Philadelphia Temperance and Benevolent Association, acting in this district.

Sec. 6. The officers of this society shall be elected annually, on the first Thursday in November of each and every year.

Sec. 7. The society, for a portion of each year, shall hold weekly meetings in such days and place as may be set forth in its by-laws.

Sec. 8. The persons who shall adopt this constitution by subscribing their names to the same, together with such others as they may from time to time elect by an unanimous vote, shall constitute the members of this society. Each member to pay into the treasury the sum of \$ in advance, annually.

Sec. 9. The donations in clothing, to be made by the society, shall be entered on two separate pieces of paper, stating the number of garments, the name and residence of the recipient, and signed by the first directress and the donor or donors, and sent to the steward of the Philadelphia Temperance and Benevolent Association of this district for his approval; the paper marked approved by the steward, to be given to the treasurer of this society, and the duplicate paper left with the steward above named.

Sec. 10. No moneys to be drawn from the treasury for any purpose except to buy materials to make clothing for the purpose set forth in Article 2.

Sec. 11. All moneys disposed of to purchase materials to carry out the objects of this society, shall be by a vote of two-thirds of

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the members present at a regular meeting, and shall be drawn from the treasury by an order signed by the first directress and countersigned by the secretary. A bill of the goods purchased shall be placed in the hands of the treasurer.

Sec. 12. The society needing any of the goods in the hands of the treasurer, to keep them employed in making clothing, may obtain such articles as are indispensable to that end, by an order signed by the presiding directress and countersigned by the secretary.

Sec. 13. The officers of this society may, by the concurrence of any three of its members, call a special meeting of the society at any time and place they may see proper.

Sec. 14. This constitution cannot be altered at any time unless such alteration meets the approbation of the Philadelphia Temperance and Benevolent Association.

Sec. 15. It shall be the duty of each member of the society to encourage every applicant for aid to join some one of the Temperance Beneficial Associations.

Deposition of J. B. Stryker.

I am not a member of the Philadelphia Temperance and Benevolent Association. I ceased to be so about May or June last, by resignation. I do not intend joining the society again as I know of. I have known the Philadelphia Temperance and Benevolent Association since its formation. It was formed on the 9th of December 1839. I have been acquainted with the operations and movements of the society from that time to the present. The paper annexed to this deposition, marked (A), contains an account of the mode of operation by the society in the distribution of charity. We organized under our constitution and divided into districts; the districts extend over such portions of the city and county as is designated by the plan attached to the printed constitution. Each district has a steward and physician, who have been performing their duties since the formation of the society. The persons to whom we distribute our charity are persons who abstain from the use of intoxicating drinks. It is not necessary that they should be members of any temperance society in order to entitle persons to the charity of the society; but evidence must be given to the officers of the society that the applicants are strictly temperate before they can entitle themselves to benefit. The fact of a person belonging to some temperance or temperance beneficial association, (of which a certificate must be produced, the form of which is hereto annexed), is *prima facie* evidence of their temperate character, and of his or her abstinence from intoxicating drinks. A certificate of such membership precludes the necessity of further inquiry. We have heretofore given more to persons not members of our society, than we have to those who are. The advancement of the temperance is not the main and

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direct object of this association. Its principal object is the distribution of charity to the temperate poor. Temperance is the object of the society only so far as it is auxiliary to or the consequence of the principal object of the society. The letter annexed, marked (C), is the letter addressed to the different societies in the city and districts, at the day of the date thereof. When the certificate is produced to the steward of our society, and if it is satisfactory, he immediately draws an order on the treasurer for the amount; if not, he visits the applicant in person. The society was formed principally by individuals who had, previous to its formation, been members of and zealous in the cause of temperance societies, and persons who have joined the association since its formation have been principally members of some temperance society. We have received the patronage of and been assisted by individuals who are members of no temperance society, and who have never joined the Philadelphia Temperance and Benevolent Association.

Cross-examined.—I resigned, I think, in May or June last, before the matter was before the auditor. The object of my resignation was to leave the society to enable me to testify in matters relative to the society. I was treasurer in the society, and active in getting it up. I have no intention at the present moment to rejoin that society. I don't know that I shall ever join it again. All the members take the pledge of temperance.

Paper referred to in the deposition of Stryker, marked (A).

The Philadelphia Temperance and Benevolent Association was formed in the year 1839.

The associators having for their object the relief of the worthy suffering poor, and to persuade the drunkard to forsake his course of ruin and misery, felt that the cause they were about to espouse was the cause of the whole human family; they therefore invited people of every denomination who were willing to walk under the temperance banner, to become members of this association. The society, in the election of its officers and board of managers, have always endeavoured to select them from the various denominations of people, only having care to elect such as they thought best qualified to advance the interest of the society. We now cordially invite all who are willing to unite with us in our enterprise, to become members of the association. Any person may become a life member by paying five dollars into the treasury, and signing the constitution. The society does not require annual contributions from its members, but the members, like every one else, have the privilege of giving at any time as much as they see proper. The collectors for the society will attend its public meetings to receive members to the association, and donations from any persons that see proper to give. If any persons should be present at those meetings wishing to become members, and not having the money

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with them, they can subscribe, and the money will be called for as they may direct; assuring all the donors that every care shall be taken to have their alms disposed of in a way calculated to diminish crime and pauperism, and to feed and clothe the worthy temperance poor. The treasury is exhausted; your aid is especially needed to enable us to prosecute the objects of the association. Your money shall not be used to pay salaries. We have none to pay; our officers render their services gratuitously. The associators having witnessed for years previous to the formation of their society, a waste of much of the property so generously bestowed by a benevolent community to feed the hungry and to clothe the naked, and not only the waste of much of your noble charity, but the sad effects it produces on many of its recipients, by furnishing them with the means of gratifying their vicious propensities, thought that some course might be pursued to relieve the wants of the poor and needy, that would not prove to them a temptation to do evil. Alms, injudiciously bestowed, hardly deserve the name of charity. Knowing that the worthy suffering poor have claims on your sympathies, and should be sustained in a community like this, so eminent for its philanthropy, without being compelled to seek shelter from the ruthless storm and the more powerful demands of nature for food, in the almshouse, there to winter indiscriminately with about fifteen hundred mortal beings, who are the degraded victims of intemperance, clothed in all their vicious habits, and marked by an all-wise Providence, that they may be read and known of all men. Under these views, the society have sought out a plan to relieve the worthy sober poor, and to stimulate the inebriate to forsake his cups, that he also may have a claim to the bounty it bestows, if he then should require it.

The society, for the purpose of accomplishing these objects, have divided the city* and its suburbs into nine districts, to each of which they have appointed a steward and a physician, as follows: North-eastern district, No. 1, Thomas Wattson, steward; Dr L. P. Gebhard, physician. North-western district, No. 2, Thomas Robinson, steward; Dr Isaac Musselman, physician. South-western district, No. 3, Martin Thayer, steward; Dr S. Saltmarsh, physician. South-eastern district, No. 4, Samuel Ashmead, steward; Dr Rush Van Dyke, physician. Penn Township district, No. 5, Dr William W. Perrine, steward; Dr William W. Perrine, physician. Northern Liberties district, No. 6, Benjamin Naglee, steward; Dr John K. Knorr, physician. Kensington district, No. 7, John T. Smith, steward; Dr James S. Rich, physician. Southwark district, No. 8, Dr D. Francis Condie, steward; Dr D. Francis Condie, physician. Passyunk and Moyamensing district, No. 9, Charles Clarkson, steward; Dr William F. Duffie, physician.

* The city is divided into four parts; Chesnut street and Seventh street being the dividing streets.

[Grandom's Estate.]

The objects of the charity of the society are the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating drinks as a beverage. The duty of each steward is, to visit the suffering poor designed to be the objects of the charity of the association, and decide their claim to its benevolence, and draw on the treasurer for the respective sums for the purpose. The duty of the physician is, to visit the sick recommended to his notice by the steward. To facilitate our operations, and to protect us from the imposition commonly practised on benevolent associations, we have a printed certificate in blank, to be used by any of the temperance beneficial associations in behalf of any of their members who may be destitute and not able to draw on the funds of their associations. The following is a copy of the certificate, viz :

Philadelphia, 18 . .

This is to certify that _____ resides in district No. _____, and is a member of the Temperance Beneficial Association _____, in good and regular standing, destitute of the comforts of life, and in a suffering condition, and by reason of health has no claims on the funds of said association.

This certificate, signed by those officers
of the respective societies, and handed
to the steward of this, will receive
prompt attention.

_____, Steward.
_____, Pres't.
_____, Sec'y.

This society earnestly recommends all who can, (needing charity,) to connect themselves without delay to some one of those Temperance Beneficial Associations, that they may be under the watch and care of those valuable institutions, and thereby guarantee to themselves, under the certificate of those societies, the aid of this society in case of their necessity. Nearly two-thirds of the alms this society has yet bestowed have been to persons presenting those certificates. The society finds in the prosecution of its labours that the article of clothing is much needed to relieve the wants of the suffering poor. It has therefore concluded to call on the ladies (in each of the nine districts occupied by its stewards) to form benevolent societies, auxiliary to the Philadelphia Temperance and Benevolent Association. One of those societies was formed last week for the north-western portion of Philadelphia.*

Letter referred to by Stryker as marked (C).

Philadelphia, January 31, 1840.

Dear Sir:—In accordance with a resolution passed at a meeting of the Board of Managers of the Philadelphia Temperance and Benevolent Association, I am directed to notify you of the

* Its constitution is annexed to the deposition of Perrine, ante, 543.

[Grandom's Estate.]

following resolutions of the Board, and also enclose you a copy of the constitution of the association.

Resolved, That a steward be appointed to take charge of each district, under the direction of the tenth article of the constitution.

Resolved, further, That it be the duty of each steward duly to consider the claim to the charity of the association of any person residing in his district, presenting a certificate signed by the out-door steward, president and secretary of either of the Temperance Beneficial Associations, setting forth that resides in district No. , and is a member of Association, in good and regular standing, though destitute of the comforts of life, and in a suffering condition, and without claims, by means of health, on the said association.

Resolved, That this Board respectfully recommend to each of the temperance associations of the city and its suburbs, to organize themselves to visit the destitute and suffering members of their respective associations, and make application for their relief to the stewards of the Philadelphia Temperance and Benevolent Association, by certificate, as is specified in the foregoing resolutions.

Should it be the desire of your association to co-operate with the Philadelphia Temperance and Benevolent Association, in accordance with the above resolution, you may obtain of the society a printed form of the certificate by which to make application, a copy of which is herein enclosed.

Respectfully yours, &c.

WM. D. SNYDER,

Sec'y. of The Phila. Temp. and Benev. Asso.

Constitution adopted in 1840.

PREAMBLE.

The undersigned, under a conviction that from the use of intoxicating liquors as a beverage emanates a large portion of the physical and moral privations which inflict upon the human family the degradations of crime and poverty and the sufferings of disease; that through the intemperance into which individuals gradually yet certainly are led by the moderate use of alcoholic drinks, whole families, who depended upon these individuals for protection and support, are frequently plunged into want, the innocent thus suffering equally with the guilty; and with the design of furnishing aid to those poor who have become so from the visitations of God's providence, and not through the vices of idleness and intemperance, and encouragement to all to become virtuous and sober; and in the firm belief that in the temperance enterprise the best interests of the human family are contemplated, and the most enlarged and comprehensive charity intended, have formed ourselves into an association under the title of the "Phila-

[Grandon's Estate.]

delphia Temperance and Benevolent Association," under the guidance and for the purposes contained in the subjoined constitution and by-laws, viz :

Art. 1. This association shall be called "The Philadelphia Temperance and Benevolent Association."

Art. 10. The stewards shall consist of nine persons, elected from and by the Board of Managers, whose duty it shall be to visit the suffering poor designed to be the objects of the charity of the association, decide their claims to its benevolence, and draw on the treasurer for the respective sums for this purpose (always on condition that such sums are in the treasury), for which they shall give receipts to the treasurer, and at every monthly meeting of the Board shall render an account of the amount and manner of their expenditures.

Art. 12. The objects of the charity of this association shall be the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage.

Art. 13. Any person of good moral character may become a member of this association, upon signing the pledge as adopted by it. Persons thus introduced into membership will enjoy the charity of the association, if their condition should require it, but they shall not have the privilege of voting in the association. Any person by subscribing his name to this constitution, and paying into the treasury the sum of five dollars, shall be entitled to all the privileges of membership.

Art. 14. There shall be two or more physicians appointed by the Board of Managers, whose duty it shall be to visit such sick as may be recommended to their medical care by the stewards, and to report the same at each monthly meeting of the Board.

Art. 17. Believing that intoxicating liquors of any description, when used by persons in health as a beverage, are injurious, and that the chief part of the crime and suffering of the human family arises from the use of intoxicating drinks, and that total abstinence is safety to the temperate and certain reformation to the intemperate: Therefore, we, the undersigned, do agree not to use intoxicating liquors, nor traffic in them as a beverage, and as such, in all suitable ways, to discountenance the use of them in the community.

The case was argued by

Vandyke and D. P. Brown, for the appellant; and by
Price and Meredith, contra.

The opinion of the court was delivered by

GIBSON, C. J.—The office of these trustees involved the exercise strictly of a mixture of both trust and power, of which the outline was not merely sketched by the testator but partly filled up. It is unimportant that the list, as he called it, by which this

[Grandon's Estate.]

had been done, was no part of his will, but a collection of hints to assist the trustees in the exercise of their discretion, without controlling it: and that it was not admitted to probate as testamentary. A chancellor would not the less regard it in his paramount supervision of the exercise of such a discretion, to guard it from abuse. There is no discretion so absolute as to bid defiance to the inspection of the tribunals. But to induce a chancellor to control the exercise of a power like the present, would require proof of an application of the charity to purposes inconsistent with the testator's design; and what proof of it have we here? He desired the trustees to give the money in contest to a benevolent society, if any existed, "to alleviate (the sufferings of) the most prudent of the poor, but not the intemperate, in procuring *fuel, clothing*, and other necessities which such persons want *in winter*." The objects set forth in the charter of the society which claims the stewardship of this charity, are "the promotion of the temperance cause by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage." These are evidently more than what the testator had in view, which was only to provide for those who suffer in winter from hunger and cold; for the dispensation of charity by the society is not only general, but subordinate to its purpose of winning the poor from drunkenness to sobriety. Depositions were indeed read to show that its principal object, at the death of the testator, was eleemosynary, and that the inculcation of temperance was auxiliary to it. Still it was an association of a mixed character, whose functions were not restricted to the specific objects of the testator; and the question is not how it would have administered his bounty as it was constructed then, but how it would administer it as it is constructed now. The witnesses, however, are not borne out by the paper referred to by one of them as containing the fundamental objects of the association before it was incorporated; for it sets out with an invitation to "people of every denomination, who are willing to walk under the temperance flag, to join the association." Now to deprive the trustees of a discretionary power given to them without bound or limit, would require the society to show that it answers the testator's description in every point and particular. But it does not. Its objects are double and its alms are general. Who can say that it would not apply the testator's bounty to its own objects in preference to the object of the testator himself? For the cause of temperance and the employment of the poor, he had provided in another part of his instructions; and to apply this money to the purposes of the society, would make him do more for those objects than he intended. The Philadelphia Temperance and Benevolent Associ-

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ation, therefore, is not entitled, and the pretensions of no other claimant are before us. But the trustees had undoubted power to vest the title in a corporation created for the purpose, and the Grandom Institute, therefore, is the legitimate trustee.

Decree of the Orphans' Court affirmed.

Cassel *against* Jones.

The Supreme Court has not jurisdiction to issue an injunction to a corporation situate in Montgomery county, as the supervision and control of corporations is included in that class of subjects in which they are prohibited from issuing process beyond the limits of the city and county of Philadelphia.

AN injunction had issued from this court on a bill filed by the plaintiffs, Jacob Cassel and two others, complaining that in pursuance of a resolution of The Montgomery Library Company, a corporation legally established in the county of Montgomery, the defendants, members and a committee appointed for the purpose, were about to sell the books of the company and divide the proceeds among the members. The defendants filed an answer, setting forth certain proceedings had at various meetings authorizing them to sell the books purchased by the company (reserving donations) and divide the proceeds among the members. These proceedings the plaintiffs alleged to be insufficient and against the constitution of the company.

The defendants now moved to dissolve the injunction, on the ground that this court had not jurisdiction, and also argued the merits on the bill and answer. The case was argued by

St. George Campbell and *Mulvany* for the defendants.

Dallas for the complainants.

The opinion of the Court was delivered by

SERGEANT, J.—This case comes before us on a motion to dissolve an injunction issued out of this court to the Montgomery Library Company, and the question is, whether this court has jurisdiction to issue an injunction to a corporation situate within the county of Montgomery. It cannot be questioned but that the power to issue an injunction necessarily follows a grant of equity powers over the subject and the parties; and therefore if this court has jurisdiction over the subject and the parties, the injunction may be sustained, (3 *Watts & Serg.* 193;) but we are of opinion that it has not. And this will appear from a brief survey of the enact-

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ments of the Constitution and Legislature, vesting equity jurisdiction in our tribunals.

Prior to the Act of 16th June 1836, which is the main foundation of our present chancery jurisdiction, that exercised by our courts was restricted to a few specific objects. Some of them were contained in our constitutions, such as bills for the perpetuating of testimony, the obtaining of evidence from places not within the State, and the care of the persons and estates of persons *non compotes mentis*. A general authority was also bestowed on the Legislature, to vest powers to grant relief in equity, and to alter them. This authority was used in a few instances, principally in relation to assignees and trustees, by the Act of 24th March 1818, and its supplements. But by the Act of 16th June 1836, a wider range of chancery powers was given, and it is under the provisions of this Act that the present question presents itself. By the 13th section the equity jurisdiction is enumerated and distributed. A certain portion is vested generally in all the courts of common law, as well the Supreme Court as the Courts of Common Pleas, without discrimination. But afterwards, by a special enumeration, a jurisdiction is designated for the Supreme Court when sitting in banc in the city of Philadelphia, and the Court of Common Pleas for the city and county, embracing not only a portion of what was before granted, but a number of subjects not before mentioned at all; the country, it would seem, not needing, or not desiring, an equity jurisdiction in many cases in which the city and county did. The 13th section, therefore, begins by declaring the subjects of equity jurisdiction which the Supreme Court and the several Courts of Common Pleas generally shall have. Of these, the first, second and third existed already, under the Constitution: viz., the perpetuating of testimony, the obtaining of evidence from beyond the State, and the care of persons *non compotes*. The fourth, also, was already vested by the provisions of various Acts of Assembly. The fifth was new: viz., the supervision and control of all corporations other than those of a municipal character and unincorporated societies or associations and partnerships. And so also was the sixth, the care of trust monies and property, and other monies and property made liable to the control of the said courts. The act then proceeds by a new enumeration to designate what power and jurisdiction the Supreme Court, sitting in Philadelphia, and the Common Pleas for the city and county, shall have, and it repeats the only powers which are newly given by this act,—the fifth and sixth above-mentioned,—and adds other subjects of jurisdiction not before given at all, viz.: III. Bills of discovery in certain cases. IV. Bills of interpleader. V. Bills of injunction to restrain in certain cases. And VI. Bills for specific relief. Then follows the proviso, that no process to be issued by said courts of the city and county of Philadelphia, or the Supreme Court sitting therein, under the chancery powers *herein specially*

[Cassel v. Jones.]

granted, (except such as have been heretofore exercised), shall at any time be executed beyond the limits of the city and county of Philadelphia. Now what are the powers specially granted by this act? It would seem to be the six I have last mentioned. They were never possessed by any of our courts before; they are the special offspring of this Act of Assembly: and amongst them is the power of controlling a corporation, now asked to be exercised by issuing process into the adjoining county of Montgomery. What, again, are those which had been "heretofore exercised," and as to which, therefore, the powers of this court are not limited to the city and county of Philadelphia, but attend it wherever it holds a court in banc elsewhere? They are those contained in the first four of the general enumeration which, under the Constitution and prior laws, this court had uniformly exercised, and as to them the jurisdiction not being specially granted by this Act, is to remain as before.

Nor do we see any reason why this court should possess a power to control corporations, associations and partnerships throughout the State, by equity process, which would not apply to the other cases for the first time given to it by this act, of interpleader and others; partnerships, especially, often involve disputes on complicated facts, and proofs by witnesses, and hearings from time to time, which might be very inconvenient to parties brought here from a distance, and when the court is not sitting from May to September. We consider it a confirmation of this view of the question, that the Act of 13th June, 1840, sec. 39, declares that the equity powers of the Supreme Court within the city and county of Philadelphia, and of the Court of Common Pleas for that county, shall be *extended* to all cases arising in said city and county over which courts of equity entertain jurisdiction on the grounds of fraud, accident, mistake, or account; which would seem to be intended to put these subjects, as near as may be, on a similar footing with the new powers specially granted by the Act of 1836 to this court and the Court of Common Pleas of this county.

We are therefore of opinion, that the motion to dissolve the injunction must be granted, and the complainant's bill be dismissed on the ground of want of jurisdiction, without prejudice in relation to the merits, on which we give no opinion.

Judgment accordingly.

Leiper *against* Peirce.

A colourable assignment to make the legal plaintiff a witness, does not divest his interest, and every such assignment is deemed colourable until the contrary appears.

Where, therefore, the cause of action was an account stated by the plaintiff himself, without a voucher or scrap of paper to support it, and could only be recovered by the force of the plaintiff's testimony, and the consideration was not named, and there was no attempt to explain or rebut the presumption of collusion, it was *held*, that the plaintiff was not a competent witness.

ERROR to the Common Pleas of *Delaware* county.

This was an action of *assumpsit* brought by Caleb Peirce for the use of Robert E. Hannum, against Samuel M. Leiper and Peter H. Engle, who survived Archibald T. Dick, to November Term 1841, for work and labour, money paid, laid out and expended, &c.

Upon the trial, Caleb Peirce, the plaintiff, was offered as a witness, and the plaintiff read in evidence the following assignment from Peirce to Robert E. Hannum, of the claim in this suit :

Know all men by these presents, That I, Caleb Peirce of the borough of Chester, in the county of Delaware and State of Pennsylvania, for a valuable consideration to me in hand paid by Robert E. Hannum of the same place, do hereby assign, transfer and set over unto the said Robert E. Hannum, his executors, administrators or assigns, to and for his and their own proper use, without any account to be given for the same, the sum of \$603.10, and all other sum and sums of money remaining due and payable upon or by virtue of the annexed account, and all my right, title, interest and demand of, in and to the same, and do give and grant unto the said Robert E. Hannum, his executors, administrators or assigns, full power and authority to demand, sue for, recover and receive the same, to his and their own use, and upon receipt thereof, to give discharges and acquittances of the same or any part thereof; and I the said Caleb Peirce do hereby covenant and agree to and with the said Robert E. Hannum, his executors, administrators or assigns, that the said sum of \$603.10 is justly due and owing from the said persons named in the aforesaid annexed account, and that I have not received nor discharged the same nor any part thereof. In witness whereof I have hereunto set my hand and seal the 4th day of September 1841.

CALEB PEIRCE, [L. s.]

Sealed and delivered in the }
presence of us, }

SAMUEL ULRICK,
JOHN LARKIN, Jun'r.

[Leiper v. Peirce.]

Account.

Samuel M. Leiper, Peter Hill Engle and A. T. Dick,
To Caleb Pierce, Dr.

	Cr.	Dr.
1835, Nov. 24, To money expended in conducting the Delaware County Democrat six months, for firm, ...		\$625.48
1835, Nov. 24, By money received on subscription to said paper, ...	\$322.37½	
1835, Nov. 24, To services in conducting said paper for six months, ...		300.00
		925.48
		322.37½
	Balance, \$603.10½	

The defendants objected to the examination of Peirce as a witness, and the court sustained the objection; whereupon the plaintiff read in evidence the following release from Hannum to Peirce, executed and delivered to Peirce at the bar:

Know all men by these presents, that I, Robert E. Hannum, have released, acquitted, and for ever discharged, and by these presents do release, acquit and for ever discharge Caleb Peirce of and from all claims and demands arising out of or in any way accruing under or by virtue of a certain assignment by the said Caleb to the said Robert dated the 4th day of September 1841.

In the presence of }
JOSEPH J. LEWIS. }

ROBERT E. HANNUM, [L. s.]
November 28, 1843.

And proved by the court docket that the summons in this suit was issued on the 11th September 1841, and again offered Peirce as a witness. The defendants objected to his admission, but the court overruled the objection and admitted the witness, and the defendant excepted.

The plaintiff then went into evidence of his case, and the jury found a verdict for him.

Error assigned:

The court erred in admitting Peirce to be examined as a witness.

Edwards, for the plaintiff in error, referred to *Post v. Avery*, (5 *Watts & Serg.* 509).

Lewis, contra.

PER CURIAM.—The point in this case came up for decision before the report of *Post v. Avery* was published; else it is to be presumed that it would have been ruled differently. The principle of that case is that a colourable assignment to make the legal plaintiff a witness, shall not divest his interest; and that every assignment is to be deemed colourable till the contrary be made

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to appear. Here the cause of action was an account stated by the plaintiff himself, without a voucher or scrap of paper to support it; and if it is not to be recovered by force of his own testimony, it is not to be recovered at all. Why did he sell it for a consideration which the parties did not choose to name, but to turn his testimony to account? Suppose even that the assignee had given value equal to the nominal amount; what motive could he have to burthen himself with an unprofitable lawsuit, but to serve the purpose of the assignor? Suppose still further that he had shared the claim; it must have been with an understanding that the testimony of the assignor would carry it through, for it would be worthless without it. Every case of the sort comes before a court under a violent presumption of collusion; and how is it to be rebutted? That is a question which it is hard to answer. Perhaps there is not a case in a hundred that admits of explanation. It is enough for the case before us, that there was no attempt to explain; and the testimony ought consequently to have been rejected.

Judgment reversed, and a *venire de novo* awarded.

Kirkner *against* The Commonwealth.

After verdict a narr. on a recognizance stating an obligation to pay and a refusal, is a sufficient breach, where no objection was before taken that the recognizance was on condition.

The court on the trial may allow an amendment to a narr. on a recognizance by adding the words "Judge of the Common Pleas," as the person before whom the recognizance was taken.

ERROR to the Common Pleas of *Montgomery* county.

Commonwealth against Mathias M. Haas. Debt on a forfeited recognizance for \$150. Haas died after suit brought, and Kirkner, his executor, was substituted as defendant. The declaration stated: "that whereas the said Mathias M. Haas, the 23d day of March 1840, at the county aforesaid, before Joseph Royer, Esq., one of the associate Judges of the Court of the General Quarter Sessions of the peace in and for the county aforesaid, did acknowledge himself to owe to the said Commonwealth the said sum of \$150, to be paid to the said Commonwealth when unto afterwards he should be required; which same recognizance at the next general quarter sessions of the peace, held at Norristown, for the said county of Montgomery, to wit, on the 18th day of May in the year last aforesaid, before the justices of the said Court of Quarter Sessions, in due form of law, was affiled of record, as by the record

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thereof in the same court at Norristown aforesaid, in the said county remaining, more fully is manifest and appears. Nevertheless the said Mathias M. Haas (although often required) the said sum of \$150 to the said Commonwealth yet hath not paid, but the same to the said Commonwealth to pay hath hitherto altogether refused and still doth refuse; to the damage of the said Commonwealth \$150; and therefore the said attorney for the said Commonwealth, for the same Commonwealth brings suit," &c. The defendant pleaded *nul tiel record* and payment with leave.

The plaintiff offered in evidence a recognizance taken before Judge Royer on a *habeas corpus* issued out of the Common Pleas of Montgomery county upon the petition and application of George Haas, and endorsed at the foot of said writ in the following words:

"Bail \$150 principal.

"150 Mathias M. Haas, Sen."

Upon the back of said writ was endorsed as follows:

"Commonwealth }
v. } charged with larceny, and remanded by me
George Haas, } on the within *habeas corpus*.

George Haas, tent in \$150 } for appearance of the defend-
Mathias M. Haas, tent in 150 } ant next sessions, to answer,
&c., and not depart, &c.

Taken and acknowledged before me this 23d March 1840.

Jos. ROYER, Associate Judge."

The defendant objected to said recognizance being read in evidence, on the ground that it was not the recognizance declared upon; the recognizance offered being a recognizance by a Judge of the Common Pleas, and that declared upon a recognizance in the Quarter Sessions. The Commonwealth then applied for leave to amend the declaration by interlining the words "Common Pleas and of." The court permitted the amendment, and overruled the defendant's objection.

The plaintiff then gave in evidence the above recognizance and the proceedings and the criminal docket, showing that the recognizance was forfeited in court on the 19th May 1840, and *capias* same day awarded for George Haas.

The defendant then called the Hon. John Fox and Judge Royer, who proved the recognizance, and that it was taken at the Trappe, in Montgomery county.

The defendant asked the court to charge that there could be no recovery by the Commonwealth, on the ground,

1. That no breach of the recognizance was set out in the declaration.

2. That the declaration does not state whether the recognizance was taken in court, or by the Judge at his chambers.

3. That the recognizance declared upon is one taken before a

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Judge of the Quarter Sessions, whilst the one in evidence is taken by a Judge of the Court of Common Pleas.

4. That it does not appear where the recognizance was taken, whether at the chamber of the Judge or in court.

The court charged the jury that Judge Royer was a Judge, by the Constitution, of all the courts, and it was not material where he took the recognizance, if within the county, whether at the Trappe or in court; it was a good recognizance. That the defendant had not appeared, and his recognizance was forfeited, and on the evidence the Commonwealth was entitled to a verdict for the amount of the recognizance.

The defendant excepted to the charge.

Errors assigned:

1. The court erred in declaring that no breach of the recognizance need be set out in the declaration.

2. In overruling the defendant's objection to the recognizance offered in evidence, and allowing the plaintiff to amend the declaration.

3. It does not appear from the record of the recognizance admitted in evidence, that it was taken in the county of Montgomery.

Powell, for the plaintiff in error, referred to *Withrow v. Commonwealth*, (10 *Serg. & Rawle* 231); 4 *Mass.* 641; *Skin.* 100; *Dy.* 369; 3 *Chitt. Pl.* 248; 6 *Mod.* 42; 1 *Miles* 183.

G. R. Fox, contra, cited 1 *Chitt. Pl.* 265, 360, 407; 2 *Ibid.* 149, 440; *Wampler v. Shissler*, (1 *Watts & Serg.* 365).

The opinion of the Court was delivered by

SERGEANT, J.—The first error assigned is that the court erred in declaring that no breach of the recognizance need be set forth in the declaration. This is rather an inference than a declaration of the court. It is undoubtedly true that in declaring on a recognizance containing a condition, the plaintiff ought regularly to set forth the condition and aver the breach of it, in which respect it differs from a suit on a bond with a penalty; for there the plaintiff has his option either to set forth the bond and condition in the narr., and aver a breach of the condition, or he may declare on the obligatory part alone, leaving the defendant to crave oyer of the condition and plead. And the defendant might have taken advantage of the variance here on the trial by objecting on that account; but the declaration, as it now appears, is good. It states an obligation to pay and a refusal, and as there may have been no condition, we are not bound to presume it, where it does not appear and that objection was not taken. The only objection on this head was, that the recognizance offered was a recognizance taken by a Judge of the Common Pleas, while that declared on

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was a recognizance in the Quarter Sessions, and this was removed by the amendment. The case is very like *Crosse v. Porter*, (Willes 18). There the recognizance, as set forth in the declaration, was absolute, and the breach assigned was, that the defendant did not pay the sum mentioned. On demurrer, the court say, "there may be an absolute recognizance as well as a recognizance with a condition. It does not appear this is a recognizance with condition; it must be taken to be an absolute one, since no condition is set forth. We admit, that where a condition appears on record it must be set forth in the declaration, because a recognizance and condition make but one record. A breach is plainly assigned, viz. non-payment of the money." So here there is a breach set out in the declaration; for it alleges the neglect and refusal of the defendant to pay the money. The assignment of error, then, is not correct.

2. The court had clearly a right to allow the amendment, being, in fact, but a matter of form, and not changing the cause of action.

3. It sufficiently appears in the evidence that the recognizance was taken in the county of Montgomery. It appeared that the endorsement of the *habeas corpus* on which the recognizance was taken, showed it was taken at the Trappe, which is in the county of Montgomery, and this is intimated by the court in their charge to the jury.

Judgment affirmed.

Union Canal Co. *against* Pinegrove Township.

An Act of Assembly requiring a canal company to erect and keep in repair a bridge wherever the canal crosses a public or private laid out road, does not apply to a road merely dedicated to public use, and over which the supervisors have not exercised any authority.

If a bridge, which a canal company is bound to keep in repair as crossing a public road, becomes a state road, the company is thereby absolved from any further charge in respect to it.

ERROR to the Common Pleas of *Schuylkill* county, where the plaintiff below, the township of Pinegrove, obtained a verdict against the defendants below, the Union Canal Company of Pennsylvania. It was an action on the case to recover a sum of money that the plaintiffs had expended in repairing a bridge or causeway across the big dam erected in the Swatara creek, or rather against the company for not repairing said bridge which they had erected, as was alleged, in pursuance of the provision of the 16th

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section of the Act of 2d April 1811, incorporating the company. That Act provides, that whenever the canal shall cross any public or private laid out road or highway, so as to require fords or bridges to cross the same, the company shall build bridges or make fords and keep the same in repair.

It appeared from the evidence, that there was a road leading from Pinegrove down the Swatara, and crossing it near Fishing creek; one branch led on down the creek, and then over to Jonestown, in Lebanon county; another branch ran a distance up the creek, thence into Swope's Valley, so called when a settlement was made of five families at an early day. No record of the laying out of the road was produced, but a number of witnesses were examined, some of whom said that they were 63 years of age; that they had known this road from their earliest recollection. A number said they had known it for 53 years; that it was then a travelled and open road; that when they first knew it, it presented the appearance of being an old road; that it was constantly used as a travelled road for the citizens of the valley of the Swatara, to travel to Jonestown; that they hauled shingles and lumber over this road to Jonestown, and crossed the creek by a fording where the canal company erected their bridge, which was now the subject of dispute; that the inhabitants of Swope's Valley crossed the creek at the same place to get over to Shaeffer's mill, on the north side of the stream, and that at the time the canal company erected their dam in 1830, which destroyed the fording, it was a regular travelled road; and one of the engineers then in the company's employ, testified that the bridge was built by the company for that road. It also appeared from the evidence that the canal company repaired the bridge down to 1835, and after that refused to repair it. It was also in evidence that in pursuance of an Act of Assembly passed in 1834, certain commissioners were appointed by that Act to lay out a state road from Friedensburg, in Schuylkill county, through Pinegrove down said stream and across said bridge, to John Harper's in Lebanon county, on the road leading from Jonestown to Harrisburg. That on the 29th of September 1835, the commissioners so appointed made their report of the State road, and laid it across said bridge, partly on this old road and part of it on new ground. It did not appear that the supervisors of the township ever repaired this old road, but some of the witnesses said that when it was out of repair, or a tree fell across it, the citizens cut away the trees and filled up the mud holes, and this road was kept in repair as the other roads were repaired and kept in order at that early day. It also appeared that this bridge in 1837 got out of order and repair; that the canal company were notified to repair it, but they refused to do so; that then the supervisors of the township expended a considerable sum of money in making the necessary repairs.

Under this state of facts the defendants contended that this was

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not such a public laid out road as was provided for in the 12th section of the Act incorporating the company; that the company were not bound to build it in the first place, and were, therefore, not bound to keep it in repair; and requested the court so to charge the jury; but the court declined to give this instruction, and said that if the jury believed this was a public road, used and travelled by the public, by the citizens of the State who had occasion to pass and repass it, and was by them used and enjoyed as a public highway for a period of 21 years before the canal company was incorporated, they might presume it was a public laid out road, that it was laid out by authority of law, and that the record was lost, or they might presume that it was laid out by the owners of the soil, and by them dedicated to public use; and if they believed it was so used and enjoyed by the public for 21 years, it would in law be a public road or highway, and the company, in that event, were bound to build the bridge and keep it in repair.

It was also contended by the defendants that there was no evidence that the township supervisors ever repaired that road, and that without it was so kept in repair by them, it would not be a public road, even though it was open and used for 21 years. But the court said, "such is not the law. If the supervisors repaired the road, it would be strong evidence that it was a public road and had been laid out by authority of law, and it may become a public highway without the public officers even repairing it. There are some roads that will not, for more than 21 years, need a repair, yet if used for that length of time, would become dedicated to the public and for the use of the county or State."

The defendants also contended that even admitting this was a public road and that the company were originally bound to erect the bridge, yet they were not now required to keep it in repair, because the commissioners of the State laid out a State road over that bridge; hence the company were absolved from all obligations imposed by their Act of incorporation, and the public and not the company must keep it in repair after the location of that road. But the court instructed the jury that the location of the state road over the bridge did not exonerate the canal company from any obligation imposed by said Act, and the company were as much bound to repair the bridge after the laying out of the State road, as before. The locating of a new State road over an old public road, did not vacate or destroy the former road, nor deprive the citizens of the county of any of the rights which they had before obtained; therefore, if the jury believed this was a public road, that the canal company erected the bridge, they were bound to keep it in repair; and if they did not, but the bridge got out of order and repair, and the company were notified of it and requested to repair the bridge, but neglected or refused to put it in repair, and the township then went on and repaired it, the plain-

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tiffs were entitled to their verdict for the money thus expended in the repairs; and that there was no dispute about the amount thus expended, should they think the plaintiffs entitled to recover.

The defendants excepted to the charge.

Errors assigned:

1. The court erred in charging the jury that, under the evidence in the cause, they might presume that the road in question was a public laid out road, and that it was laid out by authority of law, or that it was laid out by the owners of the soil and by them dedicated to public use, and that the defendants, in that event, were bound to build a bridge and keep it in repair.

2. In charging that the location of the State road over the bridge did not exonerate the canal company from any obligation imposed by the Act of incorporation, and that the company were as much bound to repair the bridge after the laying out of the State road as before.

3. In charging that if they believed this was a public road, that the canal company erected the bridge, they were bound to keep it in repair; and if they did not, but the bridge got out of order and repair, and the canal company were notified of it, and requested to repair the bridge, but neglected or refused to put it in repair, and the township then went on and repaired it the plaintiff was then entitled to their verdict for the money thus expended in repairs.

Loeser and Meredith, for plaintiff in error.

Bannan, contra.

The opinion of the court was delivered by

ROGERS, J.—The Act of the 2d April 1811, incorporating the Union Canal Company, requires that wherever the canal shall cross a public or private laid out road, if necessary, the company shall build a bridge or make a ford and keep the same in repair. On the trial one of the matters in controversy was, whether this was such a road as imposed an obligation on the company to keep it in repair. After diligent search no record of the road can be found, and the inference is that none such now exists; but the court instructed the jury that, upon the facts in evidence, they were at liberty to presume that it was a public road laid out by authority of law, and that the record was lost; or they might presume that it was laid out by the owners of the soil and by them dedicated to public use; and in that event, if enjoyed by the public for twenty-one years, the company were bound to build the bridge and keep it in repair. Whether there was room for the first presumption is useless to inquire, as the exception is more particularly taken to the latter part of the instruction. On this point of the case we think the court was in error. For assuming that it was dedicated to public use by the owners of the soil, it

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is not a public or private laid out road within the fair construction of the Act. The Act has reference only to such roads as are laid out by authority of law, and of which, of course, a record is made, and cannot be made to include a road of the latter description, particularly in the absence of all proof that it had been treated by the officers of the township as a public road. A dedication, without more, imposes no duty whatever on the supervisors to keep the road in repair, and on that ground only can the suit be sustained by them against the company. If there was no obligation on them to repair the road, the payment was voluntary, which will not lay the groundwork of an action.

But admitting that the company was originally bound to erect the bridge, are the county to keep it in repair after the commissioners of the State, under the authority of an Act of Assembly, have laid out a State road over it? The company contend that by that Act they are absolved, and that the public, and not they, must keep the bridge in repair. And that would be reasonable, because it is just; for the conversion of a road, whether private or public, into a State road, increases the travel upon it and of course the expense of keeping it in repair; and this would be an additional burthen which we cannot suppose the Legislature intended to throw upon them, any more than would be the case if they had authorized a turnpike or rail road to be built over the same. In the latter case the injustice would be apparent, although in reality not more so than in the case in hand. We are therefore of the opinion that the location of the State road over the bridge, exonerated the company from the obligation further to keep it in repair.

Judgment reversed.

Dreisbach *against* Berger.

In ejectment by a purchaser of unseated land, proof is not admissible by the oath of the treasurer that a bond for the surplus had been given and filed in the proper office, without preliminary evidence of search for the bond and its loss.

ERROR to the Common Pleas of *Monroe* county.

This was an action of ejectment brought by Jost Dreisbach against Peter Berger. The plaintiff gave in evidence a warrant to William Henry for 400 acres of land, dated 30th Dec. 1784, and a survey thereon 25th Dec. 1794, of 423 acres 33 perches. Assessment of taxes from list of unseated lands, showing county and State taxes on the said tract for 1832, 3, 4, 5. Total, \$14.39. A deed dated 2d August 1836, from the treasurer of Northampton

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county, to Samuel Yohe, for the said tract, reciting a sale of it for taxes made on the 2d Monday of June 1836, consideration \$40, and that the said sum of \$40 had been paid by Yohe to the said treasurer in the manner provided by law. 15th Aug. 1836, record of acknowledgment in open court. Deed dated 14th November 1836, from Samuel Yohe and wife, to the plaintiff, for the same land.

The plaintiff then offered to prove by the oath of the county treasurer, that a bond for the surplus purchase money on the sale for taxes, had been given by Samuel Yohe, the purchaser, to him, and filed in the Prothonotary's office. The defendant objected, and the court rejected the evidence and sealed an exception.

The defendant produced no testimony. The court charged the jury as follows:

"The plaintiff's deed in this case showing that there was a surplus of purchase money beyond the amount of taxes and costs, he was bound to show that a bond for such surplus had been executed by Yohe, the purchaser, and without such bond having been executed, the title of the plaintiff was invalid. The giving bond for the surplus is a substantial part of the consideration of the deed. It is an act to be done by the purchaser in order to perfect his title, and until it is done he does not acquire such title as will enable him to recover. There being no evidence of such bond having been executed, the plaintiff is not entitled to recover, and the verdict must be for the defendant.

The plaintiff excepted to the charge.

Errors assigned:

1. The court erred in rejecting the evidence mentioned in the first bill of exceptions.

2. In charging that there was no evidence of a surplus bond having been given.

Reeder, for the plaintiff in error, referred to *White v. Willard*, (1 Watts 42); *Fager v. Campbell*, (5 Watts 288); *Robinson v. Williams*, (6 Watts 287); *Devinney v. Reynolds*, (1 Watts & Serg. 332).

Ihrle and Porter contra, cited *M'Donald v. Maus*, (8 Watts 364); *Connelly v. Nedrow*, (6 Watts 451); *Bartholemew v. Leech*, (7 Watts 472); *Sutton v. Nelson*, (10 Serg. & Rawle 239); *Adams v. Easton*, (6 Watts 456); *Addis*. 343; *M'Kee v. Reiff*, (4 Yeates 340); *Gray v. Pentland*, (2 Serg. & Rawle 31); *Vincent v. Huff*, (4 *Ibid.* 298); *Jones v. Holloper*, (10 *Ibid.* 326).

PER CURIAM.—The execution and delivery of a surplus bond is a constituent part of the title, and of course to be shown by the purchaser; the filing of it is not. The delivery may be shown by the treasurer's receipt for the bond; for the purchaser having done all that was incumbent on him, may repose on the official

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evidence of the act, which is part of the *res gesta*: and the same may be said of the recital of such a bond in the deed; for the acknowledgment of the officer is the same whether it appear in the body of the deed or in a receipt at the foot of it. So far the decisions go. But the proof here stands, not on the principle of *res gesta*, but on the common law rule that the best evidence must be produced—of what? Certainly of the contents of the bond; for it would not be enough to show that a bond was given, without showing that it was for the proper sum. And what is the best evidence of that? The bond itself, or an office copy of it in the first place, or proof of contents if it were lost or not to be had, in the second. But proof of loss or inability to produce any thing better, must precede proof of contents. Here the plaintiff offered to prove by the oath of the treasurer that a bond had been given and filed in the proper office. Then why not produce it? There was no legal or physical impossibility in the way. That the bond was on file in the office of the parent county, from which the county in which the action was pending had been struck off, might have been a reason for postponement to give time, but it was no reason to dispense with the preliminary proof. The exception to the charge, resting as it does on the same ground, is also unfounded.

Judgment affirmed.

Fidler *against* Bryson.

Same *against* Billings.

Under the 16th section of the Act of 13th June 1836, when the sheriff takes a bail bond and the bail do not justify after exception taken, the proper course is to rule the sheriff as formerly, to bring in the body, and compel him by attachment to procure unexceptionable bail or pay the money into court, and then the action proceeds as usual.

By proceeding at once against the original defendant or the bail excepted to, the plaintiff waives his exception.

ERROR to the District Court for the city and county of *Philadelphia*, in which verdicts and judgments were rendered for the plaintiffs below in these two actions on the case, one brought by Thomas Bryson, and other by Josiah Billings, against Daniel Fidler, late sheriff of the county of Philadelphia.

In the first action the plaintiff, Bryson, complained that on the 27th March 1840, he sued out from the District Court and delivered to the sheriff, a *capias ad respondendum* against Jacob Ber-

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lin, on which the sheriff arrested him, and took a bond from him and two sureties, conditioned, if the defendant should be condemned in said action, he should satisfy the condemnation money or surrender himself into the custody of the sheriff, or in default the sureties would do it for him, which sureties were not reasonable sureties having sufficient estate within the said county, and that within 20 days after the sheriff's return and notice, he excepted, and gave notice thereof to the defendant's attorney and the sheriff, but the sureties did not justify, nor was any other bail added or substituted, but the defendant made default, the plaintiff proceeded in the action and recovered judgment against the defendant, and issued a *capias ad satisfaciendum*, which was returned *non est inventus*.

The other suit, in which Billings was plaintiff, was of the same kind, but the plaintiff after recovering a verdict and judgment against the original defendant, Joel Brett, and after the return of the *capias ad satisfaciendum*, brought suit upon the bail bond taken by the sheriff, and recovered judgment upon it and issued a *fi. fa.* and *ca. sa.*, which were returned *nulla bona* and *non est inventus*.

Various errors were assigned, and the cases were argued by

C. Fallon, for the plaintiff in error.

G. M. Wharton, contra.

The opinion of the Court was delivered by

GIBSON, C. J.—It is a cardinal principle in the exposition of statutes, that the judge is to consider the old law, the mischief and the remedy. He is also to bring the interpretation as near as may be to the principles of the common law; and he is consequently to depart from the old law no further than is necessary to correct the mischief. These principles are elementary and familiar. Now the old law of bail in civil actions, if it was not in all respects the most convenient, was certainly simple in its apparatus as well as speedy in its results; and it was so frequently explored that it was well known. If the defendant put in insufficient bail, or no bail at all, at the return of the writ, the plaintiff might take an assignment of the bail-bond, or rule the sheriff to bring in the body, which he could not do, having set the defendant at large; and he had therefore no other means to extricate himself from the dilemma than to cause unexceptionable bail to be put in, or pay the sum sworn to into court. Thus, though the sheriff was liable for the sufficiency of the bail, as he still is by the statute before us, he could not be pursued by action. But that was not the defect to be remedied; for the attachment was as effectual, much less burthensome, and infinitely more convenient, than an action which might delay the plaintiff for years, and subject the sufficiency of the bail to the uncertain judgment of a

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jury after it had been determined by the court. Unless the question were treated as an open, one there would be nothing to try and consequently no need of an action. It is no answer to say that the jury passes on the sufficiency of bail in a replevin bond. The reason is, because the question of sufficiency has not been decided by the court in the first instance. The mischief of the old law, or to speak more properly, the inconvenience of it if it were one, consisted in the necessity it imposed of finding bail twice; and the object effected was to make bail to the sheriff serve for bail to the action. For that purpose it was provided that the condition of the bail-bond should be in the form of the condition of a recognizance of special bail; that the sufficiency of the bail should be open to exception, and that the sheriff should be responsible for it, but that his responsibility should cease if exception were not taken, or if taken not sustained, or if the bail should justify, or if other sufficient bail should be added or substituted. Then why not treat the bail-bond as a recognizance of special bail entered in court or certified by a commissioner? There is no difficulty except in the form of the security; and there is no technical difficulty in the way. On the contrary, we would have before us a beaten path which would conduct us to certainty of result. If the bail do not justify, rule the sheriff to bring in the body, and compel him either to procure unexceptionable bail or pay the money into court. That done, the action may go to trial in the usual way. If the other course were taken, the plaintiff would first have to prosecute the original action to judgment without having the defendant in court—a monstrous anomaly for which there is no necessity, as our practice is sufficiently anomalous without it. And what then? He would have to prosecute a second action against the sheriff in which there would be nothing to try, the whole having previously passed *in rem judicatam*; for I take it, that the judgment in the original action, and the adjudicated insufficiency of the bail, would conclusively constitute a cause of action for recovery; and the sheriff might, it is true, be reached in this way, but most frequently after the responsibility of his sureties had expired. What other consequences might follow it is impossible to say, for the difficulties which lie in the way of every new form of proceeding disclose themselves only when it is subjected to the touchstone of experience. But the anomaly noticed would not be the only one. By the old law the delivery of a declaration in chief, or the acceptance of a plea, is a waiver of exceptions to the bail. Now, according to the old law, such a waiver operates a discharge of the sheriff's responsibility; and how can it do otherwise under the statute? To proceed against the defendant in the original action as if he were regularly in court by his bail, would involve the absurdity of proceeding inconsistently. Better sue the sheriff at once when there has been a forfeiture of the bail-bond, allowing him to make any

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defence which the defendant in the original action might have made ; and even that would have been an anomaly. Still better to pursue the old course of compelling the sheriff to procure unexceptionable bail, and let the original cause be tried on its merits. Such a course is surely more natural, simple and convenient, than one which would produce such monstrous absurdities as those in the proceedings before us, which exhibit a judgment against a party who was not in court, and a recovery against bail who had been rejected and discharged. These considerations induce us to say that, for the purpose of remedy against the sheriff, the bond has the ordinary qualities of a recognizance and a bail-bond united, and that the proceeding to enforce the procurement of additional or substituted bail, is the same as it was before. By going on against the original defendant the plaintiff waived his exceptions to the bail, and the matter stood as if none had been taken ; and if that were not so, he could not have remedy by action against the sheriff.

Judgment reversed.

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ACT OF ASSEMBLY.

1. An Act of Assembly will not be construed to repeal by implication an express enactment, unless there be a clear and strong inconsistency between them. *Street v. Commonwealth*, 209.

2. *Quere*, whether if land be conveyed to trustees in trust for an academy, which is afterwards incorporated by an Act of Assembly directing the property to vest in the corporation, the Act is, so far as respects the vesting of the land, unconstitutional and void. *Fox v. The Union Academy*, 353.

3. One, however, who contracts with the corporation to pay money for land obtained from them and held by him, not having notice not to pay, and there being no adverse claimant who could again recover the money, cannot raise this question of the invalidity of the transfer in an action of assumpsit by the corporation to recover the money. *Ibid.*

4. It seems it might be otherwise in an ejectment for the land. *Ibid.*

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Testator, after giving his wife an annuity, directed his executors "to ascertain how much has been advanced by me to each and every of my children, &c., and how much each of them may be indebted to me on bond, note, book-account or otherwise, and to so divide the residue of my said property among my said children, &c., as that each child may have an equal share of my estate; that is, that the monies so advanced to any of my said children, &c., and for which they shall be indebted to me as aforesaid, be counted as so much paid on account of the share of such child in my estate," &c. The testator at his death held notes of each of his sons, a book-account against one, and a bond and warrant of his son-in-law never entered up. On one of the notes he had received a year's interest eight years before the date of the will; on the others no interest was ever paid. *Held*,

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1. The defendant in his affidavit of defence must swear to facts: presumptions in his favour will not supply the want of them. *Moore v. Somerset*, 262.

2. A rule of court which requires the defendant, on notice, to file an affidavit of defence, is sufficiently complied with by an affidavit made by a third person in the absence of the defendant, that he has a just defence to the plaintiff's cause of action, without setting out the particulars of it, or the deponent's knowledge on the subject. *Burkhart v. Parker*, 480.

AGREEMENT.

1. A judgment for \$91,500 was amicably revived, with an agreement annexed that it was "revived for the sum of \$9240, the whole amount for which the same was given having been fully paid and satisfied, except the debt due to the Bank of North America, of which the principal is \$4620." *Held*, it was revived as security for the debt due the bank, and that debt was the principal of \$4620, and interest due on it at the time of the agreement. *Nixon v. M'Callmont*, 159.

2. Such agreement is collateral to the judgment, and is to be construed as if distinct and separate from it, and parol evidence is admissible to explain its meaning but not to contradict it. *Ibid*.

3. The defendant executed an agreement under seal, reciting bond and mortgage for \$4000, from B. to the plaintiffs, by which covenanted, in case a sheriff's sale of the mortgaged premises should not satisfy the amount of the bond with interest and costs, over and above all liens, claims and demands, to pay the difference; and guaranteed the premises free from mechanics' liens. Appended to the specialty was a parol agreement of same date by the plaintiffs, that when and so soon as \$750 should be paid them in part satisfaction of the bond, the guaranty should be cancelled, provided sufficient releases of the mechanics' liens on the premises should be previously given to them. The plaintiffs afterwards sued out the bond, on which the premises were sold for \$2000, and distribution made by an auditor of \$552.64 for mechanics' liens, &c., and the balance to the plaintiffs on their mortgage. The plaintiffs brought covenant against the defendant on the specialty to recover the balance of the bond.

Held, 1. That covenant was the proper form of action, and that the plaintiffs might give the specialty in evidence without the parol memorandum.

2. That the report of the auditor was evidence to show how much was awarded to the plaintiffs.

3. That the parol agreement, depending, as it did, on an unperformed condition, was not an obstacle to the plaintiffs' demand.

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policy of insurance on the mortgaged premises executed by the plaintiffs to a third person and assigned by him to the defendant.

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1. The provision of the Roman law, which, in the application of a payment, requires the creditor, when the right has devolved on him by the laches of the debtor, to consult the debtor's interest in preference to his own, has not been adopted as a part of the common law; and the propriety of an instant and actual application, by a creditor firm, of the proceeds of a separate note transferred to it generally as collateral security, without specifying for what debt, by a partner indebted to it on joint and separate account, cannot be questioned. *Logan v. Mason*, 9.

2. The commissioners under the Spanish treaty awarded a large sum of money to be paid to J. Y. for himself and others. J. Y. was the agent of certain shippers, owners of property seized in South America by the Spanish government, and the plaintiff, an attorney there, had a claim on the fund for services and advances recognised by J. Y. and others interested.

Held, 1. That it was a decree in favour of the plaintiff for the amount of his claim.

2. That all parties having acquiesced in the justice of the plaintiff's claim, it amounted to an appropriation, and equity would direct the money to be brought into court and award payment out of it first to the plaintiff.

3. That the plaintiff had constructive possession of the fund and an equitable lien on it, from his having been the efficient person by whose means the money was ultimately recovered, and having parted with the documents at the request and for the convenience of the other parties interested. *Aycinena v. Peries*, 243.

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1. Under the 16th section of the Act of 13th June 1836, when the sheriff takes a bail bond and the bail do not justify after exception taken, the proper course is to rule the sheriff as formerly to bring in the body, and compel him by attachment to procure unexceptionable bail or pay the money into court, and then the action proceeds as usual. *Fitler v. Bryson*, 566.

2. By proceeding at once against the original defendant or the bail excepted to, the plaintiff waives his exception. *Ibid*.

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1. Where the ground of objection to a witness's competency is assigned in the bill of exception, no other can be taken on the argument in error. *Drexel v. Man*, 343.

2. The Supreme Court has no power to issue a mandamus to the District Court for the city and county of Philadelphia, to compel them to sign a bill of exceptions. *Drexel v. Man*, 386.

3. It *seems* the District Court may, by rule of court, require a party taking a bill of exceptions, to specify on the trial the matters of law contained in the charge to which he excepts, and that no general exception to the charge will be allowed, but only those distinctly stated. *Ibid.*

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1. An action was commenced by summons on Saturday the 1st day of January 1842, against the drawer of a promissory note dated 30th December 1840, and payable twelve months after date. *Held*, that the action was prematurely brought, the last day of grace (which was Sunday) not having fully expired before the writ issued; and that an offer in the court below to confess judgment to the plaintiff, upon terms not accepted, did not cure the error. *Thomas v. Shoemaker*, 179.

2. A month, in bills of exchange, notes and other mercantile contracts, means in all cases a calendar and not a lunar month. *Ibid.*

3. The parties to bills of exchange or promissory notes, entitled to claim the days of grace, have title to them as matter of right. *Ibid.*

4. In a suit by the holder against the maker of a negotiable note, the plaintiff cannot be called on to prove the consideration between himself and the payee, unless it be shown that the note was obtained or put into circulation by fraud or undue means. *Brown v. Street*, 221.

5. If a note falls due on a Friday, and notice of non-payment is not received by the endorser until Monday following, it would be too late if the parties lived in the same town; but an affidavit of defence must in such case state the residence of the maker, so that it may appear notice could have been regularly received in a shorter time after demand there of payment. *Moore v. Somerset*, 262.

6. In a suit against the endorser of a note, he must set out affirmatively in his affidavit of defence, sufficient to show negligence in the plaintiff in not giving him due notice. *Ibid.*

7. The endorser is bound to know the residence of the maker of a note, and in his affidavit of defence must state at least his belief in regard to it, and that he would be able to prove it to the satisfaction of a jury. *Ibid.*

8. Notice dated Rochester, New York, Dec. 28th 1841, of protest on that day for non-payment by drawee of a bill of exchange dated

BILLS OF EXCHANGE AND PROMISSORY NOTES.

at New York, was sent to New York, where it was mailed on 3d January 1842, and on the 4th was delivered in Philadelphia, where the drawer resided, to a person of the same name, and did not reach the drawer until the 8th. *Held* sufficient notice to charge the drawer. *Jones v. Wardell*, 399.

9. Reasonableness of notice to the drawer of dishonour of a bill is a question for the court. *Ibid*.

BOND.

DEED, 1.

PAROL EVIDENCE, 1.

PARTNER, 3.

PRINCIPAL AND SURETY, 1.

BOOK ENTRY.

EVIDENCE, 7, 8.

BOUNDARY.

EVIDENCE, 3.

CERTIFICATE OF DEPOSIT.

1. An instrument in writing issued by a bank, signed by the assistant cashier, "I hereby certify that C. T. has deposited in this bank, payable twelve months from 1st May 1839, with five per cent. interest till due, per ann. \$3691.63, for the use of R. P. & Co., and payable only to their order upon the return of this certificate," is not a promissory note within the statute of Anne, but a certificate of deposit on special terms. *Patterson v. Poindexter*, 227.

2. Such instrument is negotiable for the purposes of transfer only, but not to make R. P. & Co., liable on their endorsement to the holder. It is a special agreement to pay the deposit to any one who should present the certificate and the depositor's order. *Ibid*.

CHARITABLE USES.

The conservative provisions of the statute 43 Eliz., relating to charitable uses, are in force in Pennsylvania. *Zimmerman v. Anders*, 219.

CLUB.

The members of a committee appointed by a political meeting to provide a free dinner for the party, are personally liable for the bill. *Eichbaum v. Irons*, 67.

COMMON CARRIER.

1. The responsibility of a carrier upon the Ohio river, does not cease upon the delivery of the goods on the wharf, and notice given to the consignee; but it is his duty to attend to the actual delivery. *Hemphill v. Chenie*, 62.

2. Common carriers may, by special contract, limit the extent of their responsibility for the safety of goods delivered to them to be carried. *Bingham v. Rogers*, 495.

3. In an action against a common carrier to recover the value of goods delivered to him to be carried, the owner of the goods, being

COMMON CARRIER.

the plaintiff in the action, is not a competent witness to prove the contents of the trunk or the value of the articles which it contained. *Ibid.*

CONSIGNOR AND CONSIGNEE.

1. There is an implied engagement by a consignee with the public, that he will be vigilant and careful in receiving and forwarding goods intrusted to his care; and upon his refusal to receive goods consigned to him, he would be liable to an action by the owner for any loss which might be occasioned thereby. *Hemphill v. Chenie*, 62.

2. A consignee, in whose hands goods are placed to be sold, may set up the consignor's want of title as a defence to an action for the price of them. *Floyd v. Bovard*, 75.

CONSTABLE.

1. The sureties of a constable are liable for the act of the officer in levying upon the goods of a stranger. *Brunott v. M'Kee*, 513.

2. The 86th section of the Act of 13th April 1834, relative to county and township officers, which requires them to file a copy of their official oath with the town clerk, is not applicable to a constable. *Ibid.*

3. The mere omission of a constable to return his execution within twenty days, does not fix him for the amount of the debt, if he have sufficient reason for the delay. *Keller v. Clarke*, 534.

CONTRACT.

ACT OF ASSEMBLY, 3.

1. Upon a contract to guarantee the payment of a certain sum of money, in consideration of the building of a bridge by the county at a place fixed by a report of viewers, if the location be changed, there can be no recovery. *Mercer County v. Coovert*, 70.

2. A firm being large dealers in watches and jewelry, and having at all times a large stock on hand, accepted an order to pay \$100 in watches, or a watch, as may suit a purchaser. *Held* that the necessary presumption was that it was the understanding of the parties that they would satisfy the order out of their stock of watches on hand when the order should be presented, and that the holder had no right to insist on a description of watches which the firm happened not to have at the time, and could only procure by sending elsewhere. *Maule v. Pleiss*, 381.

CONTRIBUTION.

PARTNER, 4.

A tenant in common of a tract of land, may maintain *assumpsit* against his co-tenant, to recover his share of the rent of the premises which they had demised to a third person, upon proof that the whole rent had been paid to the defendant, who promised to pay to the plaintiff his share of it. *Gillis v. M'Kinney*, 78.

CORPORATION.

ACT OF ASSEMBLY, 2, 3 4.

JURISDICTION, 2.

COSTS.

APPEAL, 1.

POOR, 2.

WITNESS, 3, 4.

1. One who merely takes an active part in carrying on a suit in the name of another, is not liable to the plaintiff's witnesses for their daily pay and mileage, without an express promise to pay. But he is liable without such promise, where he projects and institutes the suit in another's name, and is the active agent in having it brought. *Utt v. Long*, 175.

2. A witness may bring suit for his daily pay, &c., against the party who subpoenaed him and who lost the cause, without having the bill of costs taxed and making demand before suit brought. *Ibid*.

COUNTY.

APPEAL, 1.

COURT.

JURISDICTION.

COVENANT.

AGREEMENT, 3.

DAMAGES.

In an action founded on a breach of covenant against encumbrances and an eviction, the measure of damages is the amount of purchase money, with interest from the time when the vendee ceased to be in perception of the profits actual or potential, which could not be recovered from him. *Patterson v. Stewart*, 527.

DECLARATION.

MALICIOUS PROSECUTION, 1, 3.

RECOGNIZANCE, 1.

DECLARATIONS.

EVIDENCE, 3, 6.

WASTE, 1.

WILL, 3, 4.

DEED.

PARTNER, 2.

TRUST AND TRUSTEE, 4, 6, 8.

1. Where a deed is joint, or both joint and several, the defendant, who is sued, may show that the seal of one of the obligors has been torn off. But it is otherwise where the obligation is entirely several. *Rittenhouse v. Levering*, 190.

2. J. K. and J. B. executed a deed under seal, which purported to be an assignment by J. K., J. B. and J. A. K., under the firm of K., B. & Co., "J. A. K. being absent, and acting by his attorney duly appointed," of all their estates, joint and separate, for the payment of partnership and separate debts. After certain preferences, it provided for the payment of all other partnership and separate debts *pro rata*, stipulating for a release within 3 months by residents in the United States, and within 9 months by residents elsewhere. It em-

DEED.

powered the assignees to appoint agents or attorneys, and dismiss or revoke them at pleasure, and exempted the assignees from liability for effects not actually coming to their hands, and for losses or defaults arising from the misconduct of agents, unless in cases of wilful neglect of duty, or want of proper care on the part of the assignees. The schedule appended, specified various real and personal estate of the firm, and of J. K. and J. B. individually. The only separate property of J. A. K., mentioned in the deed, was a pew in the 10th Presbyterian church.

Held 1. That the execution of the deed by only two of the firm, followed by a delivery, did not invalidate the assignment.

2. That, as it stipulated for a release, it was not valid without containing a transfer of the separate property of each of the partners; though it might not appear affirmatively, that J. A. K., who omitted to execute the deed, had separate property.

3. That the power to the assignees to appoint and dismiss agents, &c., was proper, and they would have this authority without such provision.

4. That the exemption of the assignees from liability for effects that should not come to their hands, and for losses, &c., from the misconduct of agents, &c., did not alter their responsibility.

5. That the clause giving time for a release was proper. *Hennessey v. Western Bank*, 300.

3. Deed of land to H. S. and J. H. and L. his wife, and their heirs as tenants in common, and not as joint tenants, *held* to convey one moiety to H. S. and the other moiety to J. H. and his wife. *Johnson v. Hart*, 319.

4. A common law conveyance given to an agent for transmission to the grantee, vests the title in the grantee forthwith, though ignorant of the transaction, and by his rejection of it the title reverts in the grantor. *Read v. Robinson*, 329.

DEPOSITION.

Where a party notifies a justice of the peace that a deposition is to be taken before him on behalf of the opposite party, and the justice, at his request and in his absence, puts certain questions to the witness, he shall not allege want of notice. *Barnet v. School Directors*, 46.

DEVISE.

CHARITABLE USES.

1. A tenant in common of a tract of land, devised to his co-tenant his estate, upon condition that he would convey to his daughter a certain part of the land. After the death of the testator the devisees took possession and enjoyed for a long time their respective portions; but no conveyance was ever executed. *Held* to be a substantial compliance with the requisitions of the will, and that the devise was not forfeited by the omission to convey. *Plummer v. Neile*, 91.

2. "Concerning my real estate, I do give, devise, demise and bequeth unto my wife all that lot of land whereon I now dwells, together with all the appurtenances, &c.; and all the residue and remainder of my real and personal estate not bequeathed, whatsoever

DEVISE.

it may be, I give and bequeath to my wife; and after her decease and funeral expenses is paid of, it is my will what is left, whatever real or personal or money, is to go to the S. society," &c. The testator's wife died before him. *Held*, that the wife took an estate for life in the lot in question, with vested remainder to the society, which became entitled to an immediate estate in possession on the testator's decease. *Zimmerman v. Anders*, 218.

3. A devise to an association for religious purposes, unincorporated at the testator's death, but since incorporated, is good in Pennsylvania. *Ibid*.

DISCONTINUANCE.

PRACTICE, 1.

PRINCIPAL AND SURETY, 1.

DISTRICT COURT.

BILL OF EXCEPTION, 2, 3.

ORPHANS' COURT, 1, 2.

DISTRICT COURT OF MERCER COUNTY.

Under the provisions of the law establishing the District Court of Mercer county, after a cause has been referred to arbitrators, an award made and appeal by the defendant, the plaintiff cannot sign judgment for want of an affidavit of defence. *Lusk v. Garrett*, 89.

DIVORCE.

HUSBAND AND WIFE, 1.

DONATION LAND.

The number of a tract of donation land marked upon the ground, is the best evidence of designation, and must prevail where it differs from all others. *Dunn v. Ralyea*, 475.

EJECTMENT.

EVIDENCE, 3, 10.

FRAUD, 1.

JUROR, 1.

SHERIFF'S SALE, 5.

WITNESS, 3, 4.

1. A verdict and judgment in ejectment are not evidence against one not a party or privy in another ejectment for the same land, and where the same title is in dispute. *Timbers v. Katz*, 290.

2. In ejectment, one who is neither party nor privy to the action, though an occupier of the ground in dispute for a time previous to the bringing of the ejectment, cannot be affected by the judgment that may be given in it, and is therefore a competent witness for the plaintiff. *Reid v. Stanley*, 369.

3. Though a recovery for mesne profits cannot be had till possession is recovered, yet a possession gained by the owner's entry is sufficient without the necessity of an ejectment. *Ibid*.

EQUITY.

JURISDICTION, 2.

The Act of Assembly conferring on the courts chancery power in

EQUITY.

certain cases, does not oust the jurisdiction of the common law courts exercising equity under common law forms. They are concurrent remedies, and a plaintiff may elect either. *Aycinena v. Peries*, 243.

ERROR.

1. A party is entitled to an explicit answer by the court, in their charge to the jury, to every point of law submitted by his counsel; and it is error to omit to answer. *Noble v. M'Clintock*, 58.

2. In the trial of a cause depending upon the facts in evidence, if the court in their charge to the jury review those only which have a tendency to establish one side of the case, it is calculated to mislead the jury, and is error for which the judgment will be reversed. *Par-ker v. Donaldson*, 132.

3. In answering a point put so as to meet the view of the party making it, or so as to meet only part of the facts in evidence, it is not error, but the duty of the court to frame their answer so as to be applicable to the case trying and the evidence given. *Utt v. Long*, 175.

4. A plaintiff in error cannot complain of the court's not answering a point which it was bound to answer against him. *Werkheiser v. Werkheiser*, 184.

5. It is error to submit evidence to a jury with instruction that they may infer a promise to pay, when no such inference can legally arise from it. *Gilchrist v. Rogers*, 488.

EVIDENCE.

AGREEMENT, 2, 3.

EJECTMENT, 1.

EXECUTORS AND ADMINISTRATORS, 2.

FRAUD, 1.

PAROL EVIDENCE.

PRINCIPAL AND AGENT, 4, 6.

SCHOOLS, 4.

SHERIFF'S SALE, 6.

TRUST AND TRUSTEE, 2.

UNSEATED LAND, 4.

VENDOR AND VENDEE, 2, 3.

WASTE, 1.

WILL, 3, 4, 5.

1. The testimony of a deceased witness, which has been taken on the trial of another action between the same parties or those under whom they claim, about the same subject matter, may, if proved by the notes taken of it at the trial, be given in evidence to establish the facts then testified to. *Moore v. Pearson*, 51.

2. Upon an objection to evidence, the court will not stop to hear the testimony of the objecting party as a ground to sustain their objection. *Ibid.*

3. In an action of ejectment, it is competent for the plaintiff to give evidence of the declarations of one who was a joint claimant of the land in dispute with the ancestor or alienor of the defendant respecting the boundary of it, that being a point material to the issue. And upon such evidence being given, it is not competent for the defendant to prove the declarations of the same person made at a subsequent period, and after suit brought, having a different tendency. *Ibid.*

EVIDENCE.

4. If a witness be out of the State, notes of his testimony proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appear that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence. *Noble v. M'Clintock*, 58.

5. In an action of *assumpsit* for goods sold and delivered, the plaintiff having read in evidence the deposition of a witness, it is competent for the defendant to read the testimony of the same witness taken upon a former trial of the cause and made part of the record by a bill of exception, not only to contradict the facts stated in the deposition, but to prove other facts material to the issue. *Parker v. Donaldson*, 132.

6. In an action against a bank, declarations by the cashier or teller respecting the genuineness of certain checks purporting to have been drawn by the plaintiff, made at a period subsequent to their presentation, are inadmissible to affect the defendants. *Bank Northern Liberties v. Davis*, 285.

7. Book entries of the whole number of pieces of paper delivered by a paper-hanger to his journeymen, made at the time of such delivery, and of the number of pieces actually consumed, the price of each with the price of hanging it and the gross amounts, made when the quantity was ascertained by hanging, though three or four days after the first entry, are evidence. *Koch v. Howell*, 350.

8. An account or book in writing signed by the testator and referred to in the will, is evidence on the issue of *devisavit vel non*, though it was copied from a paper which was destroyed. *Hauberger v. Root*, 431.

9. Evidence is admissible to show that the holder of a bond of the testator's produced it at the appraisement of the testator's effects, and had it inserted in the inventory, and said it had been given to him for collection, to rebut an imputation on his honesty in relation to the bond, which a witness on the other side had testified as proceeding from the testator. *Ibid.*

10. In an action of ejectment, where the defendant claims against a prior and unrecorded title, he may give evidence of valuable improvements made upon the land before notice of the plaintiff's title, in order to entitle him to the character of a *bonâ fide* purchaser for a valuable consideration. *Boggs v. Varner*, 469.

11. A recital in a deed is evidence of notice to the purchaser of the fact recited, and he will be affected by it so far as it concerns the title to the land purchased; but it will not affect him with notice in regard to the title of any other land than that which is conveyed by it. *Ibid.*

12. The title of a *bonâ fide* purchaser for a valuable consideration is not to be affected by loose, vague and uncertain evidence of the existence of a prior title. If a former owner neglects to record his title, every presumption is to be made in favour of a subsequent purchaser. *Ibid.*

13. Upon the second trial of a cause, in which a former judgment has been reversed, the counsel of either party has a legal right to read the opinion of the Supreme Court to the jury. *Noble v. M'Clintock*, 58.

EXECUTION.

CONSTABLE, 3.

LANDLORD AND TENANT, 1.

EXECUTORS AND ADMINISTRATORS.

HUSBAND AND WIFE, 2.

ORPHANS' COURT.

STAKEHOLDER, 2.

WITNESS, 4.

1. The monies paid to the distributees or the advancement to one or more of the children of the intestate, form no part of an administration account. *Rittenhouse v. Levering*, 190.

2. The decree of the Orphans' Court confirming an administration account which admits a balance in the hands of the administrators for distribution, and in which, as well as in the inventory filed, one of the distributees is charged as a debtor, is *prima facie* but not conclusive evidence of such debt; and in an action by such distributee to recover his share of the estate, he may prove that he owed the estate nothing. *Ibid.*

3. A father devised a tract of land to his two sons, J. and D., at a certain price, which was to form a part of his estate and be divided between his other children, and appointed J. one of his said devisees to be his executor. One of the legatees brought an action for his legacy against J., as executor, but in the declaration charged him personally and obtained a judgment, issued an execution and levied upon the land devised as the estate of the testator, and sold it: in an action of ejectment by the purchaser, it was *held*, that he was entitled to recover that moiety of the land which was devised to J., but not the other. *Bowen v. Bowen*, 504.

EXTINGUISHMENT.

PARTNER, 3.

PRINCIPAL AND AGENT, 2.

FACTOR.

PRINCIPAL AND AGENT, 1, 4, 5, 6, 7, 8, 9, 10.

FEME SOLE.

There is no feme sole trading in Pennsylvania but such as falls within the Act of 1718. *Jacobs v. Featherstone*, 347.

FRAUD.

PRINCIPAL AND AGENT, 3.

SHERIFF'S SALE, 4.

VENDOR AND VENDEE, 1.

In an action of ejectment, where the plaintiff's right to recover is founded upon an allegation of fraud in a sheriff's sale of the property as the estate of the plaintiff, all the proceedings by which the sale was made, and the exceptions to it, and confirmation of it by the court, are competent evidence. *Smull v. Jones*, 122.

FRAUDULENT CONVEYANCE.

A conveyance by a father to his sons in consideration of an agree-

FRAUDULENT CONVEYANCE.

ment on their part to pay his debts, is not fraudulent or void as to the creditors of the father. *Pattison v. Stewart*, 72.

GROUND RENT.

One owning a ground rent and bound by covenant to release it on being paid the principal, died, leaving an executor and devising his estate one half in trust for the wife of the executor, the other half to another person, and the ground rent was subject to a general lien for the testator's debts, and to a mortgage by and judgments against the testator. Decreed that the executor and wife should join in a release on the executor's receiving the amount due, he first giving bond as directed by the Act of Assembly. *Ex parte Peneveyre*, 447.

GUARANTY.

AGREEMENT, 3.

CONTRACT, 1.

GUARDIAN AND WARD.

INFANT, 3.

HIGHWAY.

RIVER.

HUSBAND AND WIFE.

1. Arrears of alimony due at the death of the wife in the case of a divorce *a mensâ et thoro*, are not recoverable from the husband by the personal representatives of the wife. But if during the life of the wife the husband unjustly avoids the payment, by reason of which the wife contracts debts, and her representatives sue for the use of her creditors, then they may recover. *Clark v. Clark*, 85.

2. A husband is entitled to letters of administration upon his wife's estate; and if they issue to a third person, he will be a trustee for the husband; but in an action by him against the husband, the regularity of the letters of administration cannot be impeached. *Ibid.*

3. Where land is bought by and conveyed to a daughter, whose mother assists her to pay for it with money paid on a bond of her own, the proceeds of her land, such money is not necessarily to be taken to have been reduced into possession by the husband of the mother, merely because he joined her in the receipt given to the obligor, if the husband never exacted the payment of the bond, and the money did not pass through his hands, and he exercised no act of ownership over it. *Timbers v. Katz*, 290.

4. Between the husband and wife, his possession of a chose in action may be qualified by his intention, and the ownership follows his will, and it is the same even against creditors or their trustees under the Insolvent Act. *Ibid.*

5. Where the husband lives in the same city as the wife, and the wife contracts debts for shopkeeping, and the husband and wife are living separate, the husband and wife are not suable. *Jacobs v. Featherstone*, 346.

6. Even if they were necessities furnished, and the husband were liable, the wife cannot be joined as defendant in the suit. *Ibid.*

INFANT.

1. An over-supply of an infant's wants, though the articles might in other respects be ranked as necessities, gives a demand against him only for so much as was actually needed; and it is the tradesman's duty to acquaint himself with the infant's circumstances and necessities, as well as to take notice of supplies by other tradesmen. *Johnson v. Lines*, 80.

2. The rule that no one may deal with an infant, is subject to the exception that a stranger may supply him with necessities; but to bring the contract within it, the burthen of proving the existence of an actual necessity lies on the tradesman, who, in regard to that, acts at his peril. *Ibid*.

3. Though the permission of a guardian, in a doubtful case, may excuse the unfitness of a supply for the infant's degree, yet no permission to deal for what is manifestly improper in quantity or sort, can subject the infant to liability in favour of one who has dealt with him *malâ fide*; but the guardian may make himself personally liable by a permission which amounts to an order. *Ibid*.

4. What are necessities, is a question mixed of fact and law; but where an excessive supply has manifestly been so gross as to shock the senses, the court may declare it to be inordinate in point of law. *Ibid*.

INSOLVENT.

HUSBAND AND WIFE, 4.

JUROR, 1.

TRUST AND TRUSTEE, 1.

Insolvent bond dated 11th January, conditioned for appearance on the third Monday of March ensuing (21st), to present petition, &c., for the benefit of the insolvent laws. On the 18th March the debtor applied for the benefit of the bankrupt law of the United States, under which, on the 17th August, he obtained his discharge. *Held*, that the application and discharge under the bankrupt law excused him from complying with the condition of the insolvent bond. *Nes-bit v. Greaves*, 120.

INSOLVENT BOND.

J. S. and G. S. brought an action against W. F. K., L. K. and W. H. W., and obtained judgment therein, and on the 21st May 1841, issued a *pluries capias ad satisfaciendum* thereon, upon which W. H. W. was arrested, and gave bond to take the benefit of the insolvent laws, and was thereupon discharged from custody. At the time of his arrest, W. H. W. was possessed of considerable personal property, had more money on deposit in bank than would have paid the amount of the execution, and was the owner of a large real estate. He forfeited his bond, and an action of debt was brought against him and his surety upon it, to which he pleaded that by reason of the possession and ownership of the real and personal above mentioned, the arrest amounted to duress and the bond was void. *Held*, that since the Act of 16th June 1836, exemption from arrest is a privilege, and that submitting to it and giving bond is a waiver of the privilege. *Winder v. Smith*, 424.

INSURANCE.

AGREEMENT, 3.

INTEREST.

ADVANCEMENT, 1.

AGREEMENT, 1.

SET-OFF, 4.

An assignment in trust for a preferred creditor, to pay and satisfy in full the sum of \$5178, to be paid to her or whoever may be entitled to receive it for her; *held*, under the circumstances, not to carry interest from the date of the assignment. *Murphy's Appeal*, 223.

INTESTATE.

EXECUTORS AND ADMINISTRATORS, 1, 2.

Father seised of land died intestate, leaving two children, infants, one of whom soon after died, and afterwards the other, unmarried and without issue, the mother living. *Held*, that the brothers of the father took the estate by descent under the 9th section of the Act of 8th April 1833, and not the mother. *Maffit v. Clark*, 258.

JUDGMENT.

AGREEMENT, 1, 2.

SHERIFF'S SALE, 7.

Under the Act of 26th March 1827, the five years from the day of entry of a judgment, within which it must be revived by *scire facias*, are exclusive of the day on which the judgment was entered. *Green's Appeal*, 327.

JURISDICTION.

ORPHANS' COURT, 1, 2.

REGISTER'S COURT, 1, 2.

STAKEHOLDER, 2.

1. The Court of Common Pleas of Allegheny county has jurisdiction to try a cause which originated in the District Court, and which was certified by the judges into the Common Pleas, on the ground that one of them was related to one of the parties, and the other had been counsel in the cause. *Spoul v. Ihmsen*, 525.

2. The Supreme Court has not jurisdiction to issue an injunction to a corporation situate in Montgomery county, as the supervision and control of corporations is included in that class of subjects in which they are prohibited from issuing process beyond the limits of the city and county of Philadelphia. *Cassel v. Jones*, 552.

JUROR.

In an action of ejectment by the heirs-at-law of an insolvent debtor, the executor of a deceased creditor is not a competent juror, and may be challenged for that cause. *Smull v. Jones*, 122.

JUSTICE OF THE PEACE.

NUL TIEL RECORD, 1.

PRACTICE, 3.

A justice of the peace may discharge from prison one committed by him for a bailable offence, whether felony or misdemeanor, taking a recognizance for his appearance at court to answer. *Moore v. Commonwealth*, 314.

LANDLORD AND TENANT.

The landlord is entitled to his rent where the tenant's goods are removed from the premises by the constable, under attachments issued pursuant to the 27th and 28th sections of the Act of 12th July 1842, and are afterwards sold by execution on the judgments of the plaintiffs. *Morgan v. Moody*, 333.

LEGACY.

WILL, 6.

LIEN.

APPROPRIATION, 2.

ATTORNEY, 1.

MECHANICS' LIEN.

The debts of a decedent not secured by matter of record, cease to be a lien on his real estate in the possession of the heirs after the lapse of seven years; and a judgment obtained against the personal representative, and a levy and sale of the land after that period, confer no title upon the purchaser. *Bailey v. Bowman*, 118.

LIMITATIONS.

PARTNER, 4.

PRINCIPAL AND SURETY, 2, 3.

1. The acknowledgment of a debt is evidence of a promise; but to avoid the Statute of Limitations it ought to be plain and express, and beyond all doubt. It is not sufficient if it is merely an inferential promise not to plead the statute made without consideration; nor where it is a disclaimer after suit brought and judgment recovered of an intention to plead the statute, accompanied by an allegation that the judgment entered was for too much. *Gilkyson v. Larue*, 213.

2. A person in possession of land, and continuing so for 21 years, claiming it as his own, is within the prohibition of the Limitation Act as well against a claim never made or heard of, as against a claimant with whom there is a dispute. *Leeds v. Bender*, 315.

3. *Quere*, whether a non-resident disseisor acquires title by the Act of Limitations to more land than is actually enclosed and cultivated. *Porter v. M'Ginnis*, 502.

LUNATIC.

WITNESS, 3, 4.

Upon a traverse of the inquisition found upon a commission of lunacy, the question is whether the mind is deranged to such an extent as to disqualify the traverser from conducting himself with personal safety to himself and others, and from managing and disposing his own affairs and discharging his relative duties. *M'Elroy's Case*, 451.

MALICIOUS PROSECUTION.

1. In an action for malicious prosecution, the want of an averment in the narr. that the prosecution was carried on without probable cause, is cured by verdict, especially where it appears that evidence was given tending to prove a want of probable cause, and the court charged the jury that they should find for the defendant, unless they should believe that the prosecution had not only been carried on ma-

MALICIOUS PROSECUTION.

liciously but likewise without probable cause. *Weinberger v. Shelly*, 336.

2. Probable cause is, perhaps, a mixed question of fact and law; and where the facts are contested, the court should leave them to the jury with instructions as to what in law is probable cause. *Ibid.*

3. The verdict cures the want of an allegation in the narr. that the prosecution was at an end, where it states an indictment returned "ignoramus." *Ibid.*

MARKET.

The Act of 12th February 1795, authorizing the extension of the market in High street, Philadelphia, is not repealed by subsequent laws, and therefore under its 4th section the city corporation had a right to pass an ordinance prohibiting the sale of beef in the western moiety of the market-house between Seventh and Eighth streets. *Mayor v. Davis*, 269.

MANDAMUS.

BILL OF EXCEPTION, 2.

MECHANICS' LIEN.

1. The *levari facias* given to mechanics and material men by the 21st section of the Act of 16th June 1836, is an execution, and comes within the provisions of the 6th section of the Act of 13th October 1840, relating to the appointment of a sequestrator. *Pentland v. Kelly*, 483.

2. An undertaker who contracts to furnish materials and build a steamboat for another, is not entitled to the benefits of the Act of Assembly giving liens to mechanics and material men. *Walker v. Anshutz*, 519.

MERCER COUNTY.

DISTRICT COURT OF MERCER COUNTY.

MESNE PROFITS.

EJECTMENT, 3.

WITNESS, 6.

MORTGAGE.

SHERIFF'S SALE, 2.

NEW TRIAL.

The refusal of a new trial by the court below is not inquirable into on a writ of error. *Werkheiser v. Werkheiser*, 184.

NUL TIEL RECORD.

Upon a plea of *nul tiel record* to a *scire facias* upon a recognizance of bail, on appeal from the judgment of a Justice of the Peace, the issue must be tried by inspection of the transcript and recognizance filed, and not of the docket of the justice. *Bell v. Murphy*, 50.

NUNCUPATIVE WILL.

WILL, 1.

OHIO RIVER.

COMMON CARRIER, 1.

ORPHANS' COURT.

EXECUTORS AND ADMINISTRATORS, 2.

STAKEHOLDER, 2.

1. In relation to distribution of an estate, the District Court have concurrent jurisdiction with the Orphans' Court. *Rittenhouse v. Levering*, 190.

2. The District Court have jurisdiction on a suit by a distributee against the administrators for his share of the estate, where a final settlement has been made of their accounts in the Orphans' Court, showing a balance in their hands for distribution. *Ibid.*

PAROL AGREEMENT.

AGREEMENT, 3.

PAROL EVIDENCE.

AGREEMENT, 2.

Though the terms of a sale of land by auction were in writing, and the bonds for the purchase money were executed in pursuance of them, yet in an action upon such bond it is competent for the defendant to prove that the written terms were altered by parol, and that the parties agreed when the bond was given, that upon the happening of a certain event the bond was not to become payable at the time expressed in it. *Morrison v. Morrison*, 316.

PARTNER.

DEED, 2.

PRINCIPAL AND AGENT, 12.

WITNESS, 2, 8.

1. The rule, that all who participate in profits are liable as partners, is subject to many exceptions. If three enter into an agreement, by the terms of which one is to do certain things and the other two certain things, each at their own expense, and each to be entitled to an equal share of the profits arising out of the subject matter of the contract, this does not constitute them all partners and make them all liable for expenses incurred by either in the performance of their part of the contract. *Heckert v. Fegely*, 139.

2. A partner may bind his copartner by a contract under seal in the name and for the use of the firm in the course of its business, provided the copartner assents to the contract previously to its execution, or afterwards ratifies and adopts it; and this assent or adoption may be by parol. *Bond v. Aitkin*, 165.

3. The bond of one partner taken at the time money is loaned to the firm, and as the consideration for such loan, is an extinguishment of the debt, and not a collateral security. *Ibid.*

4. One partner may maintain *assumpsit* against his copartner for contribution, where he pays a partnership debt more than six years after a general assignment by the firm in trust for creditors, and the defendant gives no evidence to show that the partnership accounts are open and unsettled. *Brown v. Agnew*, 235.

5. A judgment obtained by one firm against another, each of which

PARTNER.

is constituted in part of the same members, some of them being both plaintiff and defendant, cannot be executed by a levy upon the separate property of an individual member of the defendant firm. *Tassey v. Church*, 465.

PAYMENT.

APPROPRIATION, 1.

PLEADING.

AGREEMENT, 3.

POOR.

1. Aldermen of the city of Pittsburgh have jurisdiction to hear and determine the rights and liabilities of the townships of Allegheny county, respecting the support of paupers.

2. If an appeal from the order of two aldermen removing a pauper from one township to another, be quashed by the Court of Quarter Sessions for want of jurisdiction of the aldermen, it is error in the court to make any decree between the parties as to the payment of costs. *Overseers of St. Clair v. Overseers of Moon*, 522.

PRACTICE.

DEPOSITION, 1.

1. A discontinuance can only be entered by leave of the court, and though the practice is to do it without such leave first granted, yet the court on cause shown will refuse leave after it has been entered. *Schuylkill Bank v. Macalester*, 147.

2. A Court of Common Pleas, when it opens a judgment on affidavit of the defendant, ought to prescribe terms so as to confine the party to the grounds of defence set forth in his affidavit. *Gilkyson v. Larue*, 213.

3. If by the transcript of a magistrate's judgment, filed in the court of Common Pleas, it appears that execution was issued and returned "no goods and defendant not found," it is sufficient to warrant a *feri facias* without filing a certificate. *Drexel v. Man*, 343.

4. The court ought not to answer questions propounded by counsel, which are not necessary to the decision of the cause. *Fox v. The Union Academy*, 353.

5. A plaintiff cannot have judgment for want of a plea, where no rule to plead has been entered on the docket. *Bisbing v. Albertson*, 450.

6. There is discretion to be exercised by a court as to the time when evidence may be given, but it should not be entirely rejected on slight grounds. *Devall v. Burbridge*, 529.

7. Writ issued at the suit of C. S. and J. P., trading under the firm of S. & P., against G. P. & J. P., trading under the firm of G. & J. P., J. P. being a member of both firms, and was returned next day "summoned personally on G. P." In the declaration filed the day the writ issued, the plaintiffs "complain of G. P., who has been summoned, &c.; for that, &c., the defendant and J. P. (who was joined as defendant in the writ in this suit, but who was not summoned, as appears by the record,) &c., were indebted, &c." G. P. pleaded and verdict for plaintiffs. On a writ of error taken by G. P. the proceed-

PRACTICE.

ings were reversed as irregular and illegal, and such as could not be cured by verdict. *Pennock v. Swayne*, 239.

PRINCIPAL AND AGENT.

APPROPRIATION, 2.

VENDOR AND VENDEE, 6, 7.

1. A factor who sells the goods of his principal, consigned to him for that purpose, and takes the notes of the vendee, which he has discounted for his own accommodation, thereby becomes responsible for the amount of the sales in the event of the insolvency of the purchaser. *Myers v. Entriken*, 44.

2. An agent having undertaken gratuitously to collect a note and book-account, surrendered them to the debtor, from whom he took a new note to himself for their amount: *held*, that this was an extinguishment of the original debt, and the agent was liable for its amount to his principal. *Opie v. Serrill*, 264.

3. If one is applied to as agent to investigate the title of another to a lot which he has an interest in purchasing, and he undertakes the duty, he cannot use the information thus acquired to the injury of his principal. He is bound to disclose to him any material information obtained concerning the title, and if he conceals it and buys himself, it is a fraud; and he cannot hold the property without reimbursing to the principal any loss he may sustain by failing in the purchase. *Reid v. Stanley*, 369.

4. In a suit by a principal abroad against his factor here, seeking to charge him with losses occasioned by his negligence, the defendant cannot, to show he had kept the plaintiff informed of his doings, give in evidence a deposition stating that the defendant gave the witness particular instructions to see the plaintiff and inform him of the state of his consignment particularly, and the sales made, when the witness states he had no copy of account sales, and showed none to the plaintiff, and sales had long before been made of which no account had been sent. *Brown v. Arrott*, 402.

5. A factor is liable for a loss arising from his neglect to keep his principal informed of matters material to his interests. *Ibid.*

6. Evidence is not admissible on the part of a factor, in a suit by the principal against him founded on the factor's negligence, to show that it is not usual for factors to transmit to their principals monies received by them as long as any part of the consignment remained unsold, or if sold, as long as any part of the monies remained unpaid, though the honesty of the agent is not disputed, and there is no ground to believe the monies might thereby be lost. *Ibid.*

7. A factor is bound to remit to his principal the monies received from sales of a consignment, unless there be an agreement or custom of trade, and if the latter be himself the factor of a principal abroad, he is bound to call on his factor in this country to transmit monies received when he is informed of it, and if the money is lost by neglect to do so, he is answerable. *Ibid.*

8. In October or November 1822, the defendant was apprised of a sale by his agent in Boston, payable in February or March. In May the defendant wrote, stating he expected an account and remittance. Six days after he wrote that he need not make a partial remittance,

PRINCIPAL AND AGENT.

but to push the sales to a close and remit the whole at once. In March the agent acknowledged to him his inability to meet a note to the defendant, payable in a few days, and no advice was sent by the defendant to the principal abroad till the agent became insolvent. *Held*, that the defendant was responsible for the loss of the goods and monies. *Ibid*.

9. Where, on the facts presented, the defendant is liable for a loss occasioned by his negligence as a factor, the onus of proving what the actual loss was, lies upon him and not on his principal, and in the absence of such proof the full value of the goods, or at least of the money produced by their sale, is the measure of damages. *Ibid*.

10. The factor sold goods to J. F. on a credit of six months, taking a note payable to himself, including in it a debt owing to himself, and afterwards released to J. F. and came in under his assignment. *Held* that he made the debt his own by blending it with his own money, and releasing J. F. without authority. *Ibid*.

11. The relation which exists between a notary and the holder of a negotiable note, with regard to the protest of the note and notice to the endorsers, is that of principal and agent, and no more strict performance of duty is required of the former than is indicated by the uniform practice of the place where the note was protested. *Parke v. Lowrie*, 507.

12. Partners must act with good faith towards each other, and if one of them be served with process in action against the firm, and judgment be obtained and execution levied upon the partnership property, it is his duty to give notice of it to his co-partners; and neglect to do so subjects him to an action. *Devall v. Burbridge*, 529.

PRINCIPAL AND SURETY.

1. Sureties in a bond of indemnity have a right to require the obligee to bring suit on the bond in case of a breach, and if such suit is begun and there is a fund of the principal's to pay the debt, the court will refuse leave to discontinue, where a rule of reference has been taken out by the defendant, though the arbitrators had not been appointed when the discontinuance was entered. *Schuylkill Bank v. Macalester*, 147.

2. Where a surety has done no act before his claim is barred at law, manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to his rights, such as bringing suit on the bond within the six years, or taking an assignment of it, his remedy is not on the bond but for money paid; and a court of equity will not, after the six years, subrogate him to the rights of the obligee. *Rittenhouse v. Levering*, 190.

3. A surety will be subrogated within the six years, where he has paid the money and the original security remains intact; and the fact that there was no assignment or actual substitution within that time will be disregarded; for while the legal right remains, it draws to itself all the consequences of an actual substitution in a court of equity. *Ibid*.

4. A surety is not *ipso facto* on payment of the debt of his principal subrogated to the creditor's rights: his remedy is not *prima facie* on the bond but for money paid. *Ibid*.

PRINCIPAL AND SURETY.

5. A surety of a surety who has paid and discharged the obligation, has the same equity of subrogation as the surety to whom he was bound. *Ibid.*

RECOGNIZANCE.

NUL TIEL RECORD, 1.

1. After verdict a narr. on a recognizance stating an obligation to pay and a refusal, is a sufficient breach where no objection was before taken that the recognizance was on condition. *Kirkner v. Commonwealth*, 557.

2. The court on the trial may allow an amendment to a narr. on a recognizance, by adding the words "Judge of the Common Pleas," as the person before whom the recognizance was taken. *Ibid.*

REGISTER'S COURT.

1. This court will not inquire whether an issue was properly directed by the Register's Court to the Common Pleas on a writ of error to the latter court; they can only do this on an appeal from the Register's Court. *Werkheiser v. Werkheiser*, 184.

2. The Common Pleas may try such issue, though the defendant resist the making of the issue and refuse to plead. *Ibid.*

RELIGIOUS SOCIETY.

DEVISE, 1, 2, 3.

RENT.

TRESPASS 2.

RIVER.

1. The license allowed by the statute of 1803, to the owners of lands adjoining navigable streams declared by law to be highways, to erect dams in them for mills or other water-works, provided they do not injure the navigation or prevent the fish from passing, is not indefeasible, but subordinate to the right of the commonwealth. *Monongahela Navigation Company v. Coons*, 101.

2. The legislature may constitutionally incorporate a company to make a lock and slackwater navigation, without requiring it to make compensation for consequential damage to private property in the execution of the work: *held*, therefore, that the Monongahela Navigation Company, incorporated to make such a navigation from Pittsburgh to the line between Pennsylvania and Virginia, by dams and locks in the Monongahela river, was not liable in an action on the case, for obstructing the water in the Youghiogeny river by a dam in the Monongahela, to the injury of the plaintiffs' mill. *Ibid.*

ROADS.

CONTRACT, 1.

1. An Act of Assembly requiring a canal company to erect and keep in repair a bridge wherever the canal crosses a public or private laid out road, does not apply to a road merely dedicated to public use, and over which the supervisors have not exercised any authority. *Union Canal Company v. Pinegrove Township*, 560.

ROADS.

2. If a bridge, which a canal company is bound to keep in repair as crossing a public road, becomes a state road, the company is thereby absolved from any further charge in respect to it. *Ibid.*

SCHOOL DIRECTORS.

SCHOOLS, 1, 2, 3, 4.

SCHOOLS.

1. Under the Act of 16th April 1840, a rated inhabitant of a township is a competent witness in a suit to which the school directors of the township are a party. *Barnet v. School Directors*, 46.

2. Such directors may maintain assumpsit for money had and received against a delinquent collector of the school tax. *Ibid.*

3. Where the declaration set forth their individual names, it was held they might be struck out as surplusage. *Ibid.*

4. In such suit, where the appointment of the defendant as collector is lost, it is competent for the plaintiffs to prove that he represented himself as collector, received the school-tax as such, and was, in fact, collector of the township for a certain year. *Ibid.*

SEQUESTERATOR.

MECHANICS' LIEN, 1.

SET-OFF.

AGREEMENT, 3.

1. Damages arising from a breach of warranty of goods sold may be set-off in an action on a note given in a different transaction. *Phillips v. Lawrence*, 150.

2. The defendant under the Act of Assembly, may not only defalcate a claim founded on the contract on which the plaintiff sues, but one arising from breaches of other contracts. *Carman v. The Franklin Fire Insurance Company*, 155.

3. Breach of a contract by the plaintiff, producing loss to the defendant, is sufficient consideration to sustain the defence of set-off or defalcation. *Ibid.*

4. An action for money had and received will lie to recover back the excess of interest taken from one to whom an usurious loan has been made; and, in Pennsylvania, the defendant who is sued as the drawer of a promissory note, made by him to the order of the plaintiff, may, under the "Act for Defalcation," defalk an excess of interest taken from him by the plaintiff upon other and prior loans of money. *Thomas v. Shoemaker*, 179.

5. An unliquidated cross-demand arising from a distinct and independent contract may be set-off. *Ellmaker v. Franklin Fire Insurance Company*, 439.

SHERIFF.

TRESPASS, 2.

SHERIFF'S SALE.

AGREEMENT, 3.

FRAUD, 1.

TRUST AND TRUSTEE, 1.

1. There is nothing illegal in two or more persons agreeing to-

SHERIFF'S SALE.

gether to purchase a property at sheriff's sale, and fixing a certain price which they are willing to give, and appointing one of their number to be the bidder. *Smull v. Jones*, 122.

2. A sheriff's sale of land before the Act of 6th April 1830, extinguished all prior mortgages, and it was not in the power of the sheriff or purchaser or parties to keep them alive as mortgages so as to affect third persons subsequently buying, by any memorandum in the conditions of the sheriff's sale or bargain amongst themselves of which such subsequent purchaser had notice. *Mode's Appeal*, 281.

3. It is not error for the court to charge, where a notice was given at a sheriff's sale, that if only one notice was given, and that was given by another person without the knowledge, direction or interference of the plaintiff's grantor, (who was the purchaser), he could not be affected by it. *Drezel v. Man*, 343.

4. Where land is sold by the sheriff, and a person who claims title to it in good faith gives notice that the defendant in the execution, as whose property it is sold, has no title to it, and he afterwards becomes the purchaser, he is not thereby estopped from setting up the title thus purchased to protect himself from an action of trespass *quare clausum fregit*. *Porter v. M'Ginnis*, 502.

5. In an action of ejectment by a purchaser at sheriff's sale to recover the property purchased, the defendant cannot avail himself of any informality in the judgment and executions under which it was sold; especially if he was also the defendant in the judgment. *Bowen v. Bowen*, 504.

6. The report of an auditor appointed to distribute monies raised by a sheriff's sale of real estate, is not evidence in a subsequent ejectment for the land brought by the sheriff's vendee. *Leeds v. Bender*, 315.

7. Such auditor can in no case set aside a judgment of a court brought before him. He must either allow its amount according to its date, or suspend his decision till its validity is decided. *Ibid*.

SPANISH TREATY.

APPROPRIATION, 2.

ATTORNEY, 1.

STAKEHOLDER.

1. A defendant holding funds in his hands as a stakeholder, or for the benefit of others, may be sued in *assumpsit* for money had and received, and a special judgment and execution had on equity principles applied in Pennsylvania in common law forms of proceeding, and the court will control the execution of the process by ordering the money to be brought into court or otherwise. *Aycinena v. Peries*, 243.

2. One having funds in his hands as stakeholder or agent for others, may be sued, though he has never been called on to settle his accounts in the Common Pleas, and though he is administrator *de bonis non* of one from whom the funds passed; such property forming no part of the estate of the testator, and not being within the jurisdiction of the Orphans' Court to settle and distribute. *Ibid*.

3. Bringing suit against the personal representatives of such testa-

STAKEHOLDER.

tor does not conclude the party interested from proceeding against the fund, inasmuch as he has two remedies, *in rem* and *in personam*, and may pursue both till satisfaction. *Ibid.*

STATUTE.

In construing penal statutes, the words descriptive of an offence or its punishment are not to be bent on the one side or on the other ; and statutes *in pari materia* are to be construed together, and the legislative meaning of words followed. *Mayor v. Davis*, 269.

STEAMBOAT.

MECHANICS' LIEN, 2.

SUBROGATION.

PRINCIPAL AND SURETY, 2, 3, 4, 5.

SURETY.

PRINCIPAL AND SURETY.

TAXES.

UNSEATED LAND.

TENANT FOR LIFE.

WASTE, 1, 2, 3.

TENANT IN COMMON.

CONTRIBUTION, 1.
DEVISE, 1.

TRESPASS.

TURNPIKE, 2, 3.

1. Constructive possession is sufficient to maintain trespass. *Dallam v. Fittler*, 323.

2. In trespass against a sheriff, for seizing and selling the plaintiff's goods under a judgment against another person, the amount paid out of the proceeds of sale for rent of the premises, cannot be received in evidence to abate the damages. *Ibid.*

TRUST AND TRUSTEE.

ACT OF ASSEMBLY, 2, 3, 4.
WASTE.

1. The assignee of an insolvent debtor is not incapable, by reason of his fiduciary character, of becoming the purchaser of the debtor's real estate when sold by the sheriff upon a mortgage which encumbered it before the time of the assignment. *Fisk v. Sarber*, 18.

2. If one procure a deed of conveyance of land to be made to him upon the promise and assurance that he will hold it in trust for another, that trust may be established by the parol testimony of the grantor ; and if the land be sold by the grantee, the *cestui que trust* may maintain an action against him to recover the price. *Miller v. Pearce*, 97.

3. Ordinarily chancery executes only a trust sufficiently formed to put the legal estate out of the grantor, or an agreement for a trust

TRUST AND TRUSTEE.

founded on a valuable consideration and not a mere voluntary one, and creditors are but volunteers. *Read v. Robinson*, 329.

4. Where one executed a voluntary assignment in Montgomery county, for the benefit of creditors, with preferences, and handed it to his son to take to Philadelphia, to a third person, who called with it on the assignee in Philadelphia and desired him to take it, but he refused to have anything to do with it; *held*, that a presumption arose from the nature of the case that the deed was tendered by authority of the grantor. *Ibid*.

5. In such case the Court of Common Pleas has power to substitute another trustee under the 23d section of the Act of 14th June 1836. *Ibid*.

6. A deed of trust may be taken to be recorded by creditors for whose use the estate is conveyed by it, or any party interested in the trust. *Ibid*.

TOLLS.

TURNPIKE.

TURNPIKE.

1. To determine whether a toll-house, erected by a turnpike company under their charter, within the limits of the road, be authorized, the only question is whether it was built and has been and is still used for that purpose; if that be the case, they are not responsible to the owner of the adjacent soil. *Ridge Turnpike Co. v. Stoeper*, 379.

2. It is otherwise if they put it up or have used it for any purpose not connected with the road or the collection of tolls. *Ibid*.

3. *Quære* whether the action by the adjacent owner should be in trespass or case. *Ibid*.

4. An action of trespass would lie, *Per Kennedy, J.* *Ibid*.

UNSEATED LAND.

1. It is essential to the validity of a sale of unseated land for taxes, that it should be so designated in the assessment as to lead the owner to a knowledge of the fact that it is his land which is assessed. *Dunn v. Ralyea*, 475.

2. After the lapse of two years from the date of a treasurer's sale of unseated land, there is no title in the original owner which is the subject of a sheriff's sale, nor will such sale entitle the purchaser to recover the amount of the surplus bond given to the treasurer. *Church v. Riddle*, 509.

3. The identity of a tract of unseated land sold for the payment of taxes, is a matter of fact which cannot be made to depend alone upon the name in which it is sold, or any other particular matter of description; it is error, therefore, to reject the evidence of such a title because the name in which it was sold does not correspond precisely with that of the warrantee or any subsequent owner. *Thompson v. Fisher*, 520.

4. In ejectment by a purchaser of unseated land, proof is not admissible by the oath of the treasurer that a bond for the surplus had been given and filed in the proper office, without preliminary evidence of search for the bond and its loss. *Driesbach v. Berger*, 564.

USURY.

SET-OFF, 4.

VENDOR AND VENDEE.

DAMAGES, 1.

1. A symbolical, constructive or temporary delivery of personal property is not sufficient to change the ownership as to creditors; there must be an actual delivery at the time of the transfer, and a continuing possession; otherwise the sale, although *bonâ fide*, as between the parties themselves, is fraudulent in law. *M'Bride v. M'Clelland*, 94.

2. Where a draft on the vendor was presented in payment for goods to his clerk, who refused it, but by the vendee's direction showed it afterwards to the vendor, the declarations of the latter that he did not know the drawer and would not do the work on it, but that he would see the vendee, are evidence in an action for the goods. *Koch v. Howell*, 350.

3. The retention of such order by the vendor until the trial, is not conclusive evidence of his acceptance of it. *Ibid.*

4. Property in a chattel is not changed by a sale and delivery on conditions to be afterwards performed, if they are not performed; but where the delivery is absolute and the bargain is perfect or capable of being made so by reference to something else or an arbiter, the ownership is transferred. *Scott v. Wells*, 357.

5. It is certain enough when the price can be obtained by mere computation; therefore a sale of a large raft at so much per 1000 feet and delivery to the buyer changed the property, though it was to be counted and that was not done, there being nothing more to be done by the seller. *Ibid.*

6. A general agent selling a chattel may, with the assent of the vendee, rescind the contract and make a different bargain. *Ibid.*

7. An agent to sell a chattel is a witness for the owner in a suit for its price, unless his negligence or misfeasance be proved, and the presumption is against these. *Ibid.*

WAGER.

Money lost by a wager upon an election, and paid over to the winner, cannot be recovered back from him by means of a foreign attachment at the suit of a creditor of the loser. *Speise v. M'Coy*, 485.

WASTE.

1. A testator's declarations of intention in his lifetime as to the relative powers of those beneficially entitled under a trust created by his will, are inadmissible in an action for waste by the trustee against the equitable tenant for life. *Woodman v. Good*, 169.

2. An equitable tenant for life is liable to an action of waste at the suit of the trustee-in-fee of the legal estate. *Ibid.*

3. In such suit the plaintiff need not name himself trustee. *Ibid.*

WILL.

ADVANCEMENT, 1.

EVIDENCE, 8.

WASTE, 1.

1. Where a decedent was able to come down stairs to receive and

WILL.

converse with visitors, and to walk in the street, and died the next day from a rupture of the lungs; *held* not to be such extremity of last sickness as authorized a nuncupative will under the 6th section of the Act of 8th April 1833. *Werkheiser v. Werkheiser*, 184.

2. It is no reason for not admitting a will to probate that its provisions may be obscure and uncertain. *Ibid.*

3. Declarations or admissions of one of several devisees or legatees named in a supposed will, tending to prove that the alleged testator was not of sufficiently sound mind at the time to make it, or being very weak in mind was improperly influenced to make it contrary to what he would otherwise have done, are not admissible on the trial of a feigned issue directed by the Register's Court to try its validity. *Hauberger v. Root*, 431.

4. Whether made before or after the will, or by one who was a party to the feigned issue, where they may affect others not in privity with him, is not material. *Ibid.*

5. Nor is evidence admissible on such issue to prove that the testator some fourteen years before furnished a son with money to buy a farm, so that he would receive more than his share. *Ibid.*

6. Testator desired his executors to pay a certain sum of money to a benevolent society, if any existed, to alleviate the suffering of the most prudent poor, but not the intemperate, in procuring food, clothing and other necessities which such persons want in winter. A society whose objects were the promotion of the temperance cause by the diffusion of temperance knowledge, the circulation of the pledge of total abstinence from all intoxicating liquors, and the dispensation of the charity of the association to the suffering poor of Philadelphia and its districts, of good moral character, who do not use intoxicating liquors as a beverage, *held* not entitled to the legacy. *Grandom's Estate*, 537.

7. It is not important that a list of charities referred to by the testator in his will, was no part of the will, and that it was not admitted to probate as testamentary. A chancellor would regard it as controlling the discretion of the executors in the dispensation of the charities. *Ibid.*

WITNESS.

COSTS, 1, 2.

COMMON CARRIER, 3.

EJECTMENT, 2.

SCHOOLS, 1.

VENDOR AND VENDEE, 7.

1. If a witness be erroneously rejected by the court, the error is cured by the party's subsequently withdrawing his objection to his competency and agreeing to his examination. *Smull v. Jones*, 122.

2. One of the co-defendants, upon whom the process was not served, may be a competent witness for the plaintiff to prove particular facts material to the issue; but he is not competent for the purpose of establishing the fact of a partnership between himself and his co-defendants. *Heckert v. Fegely*, 139.

3. In an action to recover daily pay and mileage as a witness for the plaintiff in an ejectment by a lunatic in the name of his commit-

WITNESS.

tee, against one who was alleged to have brought and carried on the ejectment, the committee is not a competent witness for the plaintiff. *Utt v. Long*, 174.

4. In such action the executor of the lunatic is a competent witness for the plaintiff, where it appears the estate of the lunatic was sufficient to pay the costs of the ejectment. *Ibid*.

5. Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not on a former occasion given different testimony as to a particular fact. *Bank Nor. Liberties v. Davis*, 285.

6. A grantor is not entitled to mesne profits after conveyance, and therefore there is no objection on that ground to his competency as a witness for the plaintiff, his grantee. *Drexel v. Man*, 343.

7. A mere possibility of being sued is a contingent interest that goes only to the credibility of a witness. *Scott v. Wells*, 357.

8. In an action of assumpsit by three partners, in which the defendant pleads *non assumpsit*, payment and set-off, one of the plaintiffs cannot be made a competent witness by releasing after suit brought all his interest in the claim to his co-plaintiff, and paying into court all the costs of the suit which have accrued or may accrue, to the final termination of the action. *Church v. Hampton*, 514.

9. A colourable assignment to make the legal plaintiff a witness does not divest his interest, and every such assignment is deemed colourable until the contrary appears. *Leiper v. Peirce*, 555.

10. Where, therefore, the cause of action was an account stated by the plaintiff himself, without a voucher or scrap of paper to support it, and could only be recovered by the force of the plaintiff's testimony, and the consideration was not named, and there was no attempt to explain or rebut the presumption of collusion, it was *held*, that the plaintiff was not a competent witness. *Ibid*.

11. The cross-examination of a witness must be confined to the subject-matter about which he was called to testify; if he be acquainted with other facts material to the issue, he may be recalled by the other party, who thereby makes him his own witness, and is subject to all the rules which govern his examination. *Floyd v. Bovard*, 75.

12. If a witness be called and examined by the plaintiff, he may, at any subsequent stage of the trial, be called and examined by the defendant, as to any fact within his knowledge material to the defence, although he may be directly interested in defeating the plaintiff's recovery. *Ibid*.

WRIT OF ERROR.

NEW TRIAL, 1.

On a writ of error the Supreme Court inquires judicially only into points raised by the record. *Drexel v. Man*, 343.



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